DOCUMENT RESUME

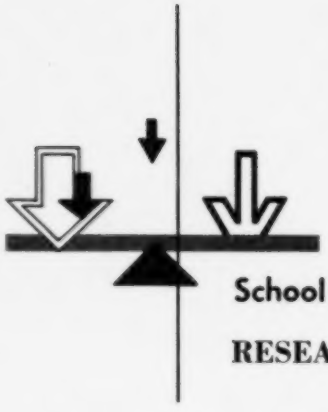
ED 070 151 EA 004 671

AUTHOR	Vaughan, Jeanette G.
TITLE	The Pupil's Day in Court: Review of 1969. An Annual Compilation. School Law Series.
INSTITUTION	National Education Association, Washington, D.C. Research Div.
REPORT NO	NEA-RR-1970-R9
PUB DATE	70
NOTE	88p.
AVAILABLE FROM	Publications Sales Section, National Education Association, 1201 Sixteenth Street, N. W., Washington, D. C. 20036 (Stock #435-22942, $2.00, Quantity Discounts)
EDRS PRICE	MF-$0.65 HC Not Available from EDRS.
DESCRIPTORS	Activism; Admission (School); Attendance; Bus Transportation; College Students; Court Cases; *Discipline Policy; Dress Codes; Freedom of Speech; Parochial School Aid; *Public Schools; *School Integration; School Law; Search and Seizure; *State Church Separation; *Student Rights
IDENTIFIERS	Legal Liability

ABSTRACT

This report contains digests of concern to public and parochial school students as well as to students in higher education institutions. The digests were compiled from court decisions published in the National Reporter System during the 1969 calendar year. The decisions reported are from 36 States and the District of Columbia. All but four are of a civil nature, three involving pupils with contraband in their school lockers and the other one concerning breach of the peace by college students. The case digests are classified under (1) admission and attendance, (2) school desegregation, (3) student discipline, (4) pupil injury, (5) religious/sectarian education, (6) transportation, and (7) miscellaneous. A related document is ED 057 501. (Author/JF)

ED 070151



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School Law Series

RESEARCH REPORT 1970-R9

The Pupil's Day in Court: Review of 1969

An Annual Compilation

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Research Report 1970-R9: THE PUPIL'S DAY IN COURT: REVIEW OF 1969

Project Director: [illegible]. SHAPIRO, Assistant Director

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FOREWORD

The American judicial system plays an important part in deciding issues that affect today's public-school pupil. Questions on school desegregation, the constitutional rights of pupils, and the legality of aid to nonpublic-school pupils, all as they affect pupils, have been ruled on by the courts in the past year. The impact of these cases may have far-reaching consequences, affecting pupils removed from the original action. This report contains those decisions involving pupils that should be of interest to those engaged in or interested in education.

Included here are state and federal court opinions published during 1969, where pupils either in elementary or in secondary schools or students attending tax-supported institutions of higher education were litigants. This is the 28th annual report in a series begun in 1942 by the NEA Research Division.

This report was prepared by Jeanette G. Vaughan, Senior Staff Associate, under the general direction of Frieda S. Shapiro, Assistant Director, NEA Research Division.

Glen Robinson

Director, Research Division

INTRODUCTION

This report contains digests of 146 judicial decisions of direct concern to pupils in the public schools and to students in higher education institutions supported by public funds, as well as to parochial-school pupils, for among these digests are decisions with issues of the legality of providing services to such pupils at public expense. The digests were compiled from court decisions published in the National Reporter System during the calendar year 1969.

The 146 decisions reported here are from 36 states and the District of Columbia. All but four are of a civil nature. Three of the exceptions involve pupils with contraband in their school lockers; the other one concerned breach of the peace by college students. The state courts are represented with 52 decisions, 18 of which came from the highest court in the state where the action began, 24 from intermediate appellate courts and 10 from trial courts. The federal judiciary produced 94 decisions, 29 from the circuit courts of appeal and 62 from federal district courts; in addition to summary actions, three decisions involving pupils were handed down by the Supreme Court of the United States. Two of these involved school desegregation, and the other an issue of pupil rights under the First Amendment.

Prior to last year almost all of the federal decisions involved school desegregation. In the past two years, however, an increasing number of the federal cases have concerned issues of pupil discipline and pupil rights.

The case digests in this compilation are classified under seven headings: (a) admission and attendance, (b) school desegregation, (c) student discipline, (d) pupil injury, (e) religion/sectarian education, (f) transportation, and (g) miscellaneous. The decisions are arranged by state under each topic; within states they are listed alphabetically by case title. Table 1 lists the decisions by the major issue raised.

School Desegregation

As has been the pattern in previous years, school desegregation in 1969 exceeded any other issue litigated by pupils. Of the 146 decisions summarized here, 66 were related to school desegregation, and all but three of these were rendered in the federal courts. These decisions in no way reflect the continuing large volume of court concern with desegregation matters or the number of school systems involved. Some cases involve more than one school system, with one concerning 44 systems, and other cases heard and decided during 1969 have not appeared as published decisions during the 1969 calendar year in the National Reporter System.

The 66 decisions on school desegregation contained in this report extend over 15 states with four of the states--Colorado, Illinois, Michigan, and New York--being outside the south. In Colorado, the federal district and appellate courts found unconstitutional and purposeful segregation in the Denver public schools. Three resolutions of the school board which were designed to alleviate segregation were ordered implemented and an attempted rescission of those resolutions was enjoined.

Two of the three Illinois school desegregation decisions concerned School District 151 in Cook County, Illinois. In a suit brought by the United States in 1968, the federal district court found that the school board operated racially identifiable schools and issued a preliminary injunction against such operation. The U. S. Court of Appeals for the Seventh Circuit affirmed the district court opinion and remanded the case to the lower court on the motion of the Government to make the injunction permanent. On remand the injunction was made permanent, and specific orders were entered to achieve a nonsegregated school system in District 151.

The other Illinois case revolved around an interpretation of the Armstrong Act. This Act requires school districts to create attendance units which will take into consideration the prevention of segregation and the elimination of separation of children because of color, race, or nationality. Relying on a state supreme court opinion, the appellate court held the Act constitutional and additionally held that the Act itself did not provide an exclusive remedy.

The two remaining school desegregation cases arising in northern states were challenges to the plans of the boards of education in Lansing, Michigan, and Geneva, New York. In both cases the plans were designed to achieve better racial balance in the public schools. The Lansing plan was upheld under a previous Michigan case which ruled that boundary changes to achieve

equal educational opportunity were permissible. Pairing of schools was held constitutional in New York and the complaint of the white parents was dismissed.

A large number of the 1969 school desegregation cases invoked the 1968 Supreme Court opinion in Green v. County School Board of New Kent County, Virginia (88 S. Ct. 1969), which held that a freedom-of-choice plan was constitutional only if it "promises realistically to work, and promises realistically to work now." This decision resulted in many cases being reheard to decide if the school desegregation plans satisfied the new standard. In Adams v. Mathews, 44 cases from four southern states were consolidated on appeals by Negro school children seeking to implement the Green decision. The Court of Appeals for the Fifth Circuit sent all of the cases back to the appropriate district courts for findings of fact and conclusions of law as to the adequacy of the existing plans in the light of Green.

Two school desegregation opinions were handed down by the Supreme Court in 1969. In United States v. Montgomery County Board of Education, the Supreme Court reinstated the district court plan for faculty desegregation that included a specific schedule with a fixed mathematical ratio. The U. S. Court of Appeals for the Fifth Circuit had held that the district court decree should be interpreted to mean "substantially or or approximately" the 5-1 ratio set by the lower court. The Supreme Court believed that the modifications ordered by the Court of Appeals would "take from the order some of its capacity to expedite, by means of specific commands, the day when a completely unified, unitary, nondiscriminatory school system becomes a reality instead of a hope."

The second Supreme Court decision, Alexander v. Holmes City Board of Education, was also an appeal from a decision of the Fifth Circuit Court of Appeals that granted the many Mississippi school districts more time in which to implement desegregation plans. Ruling per curiam, the Supreme Court said that all of the motions for more time should have been denied because "continued operation of segregated schools under a standard of allowing 'all deliberate speed' for desegregation is no longer constitutionally permissible." The Court held that under its prior holdings "the obligation of every school district is to terminate dual systems at once and to operate now and hereafter only unitary schools." The Court of Appeals was requested to give priority to the execution of the judgment as far as possible and necessary.

A case accepted on appeal and to be decided next term by the Supreme Court may have far-reaching effects on school desegregation. The federal district court for the Western District of North Carolina ordered the Charlotte-Mecklenburg board of education to submit a plan and timetable for the active desegregation of pupils to be completed by September 1970. The board was also directed to use such transportation as necessary to desegregate the schools and overcome the racially identifiable neighborhoods. The U. S. Court of Appeals for the Fourth Circuit deleted that portion of the district court order that required bussing of elementary-school children.

State tuition grant statutes for the benefit of pupils attending private schools were challenged in Louisiana, Mississippi, South Carolina, and Virginia. All four statutes were declared unconstitutional because their purpose, motive, and effect was to continue segregation in the public school systems of the states.

Pupil Discipline

A separate section on pupil discipline was added to this report this year. Formerly most of the cases classified under this heading would have been placed in the section on admission and attendance. This addition reflects an increase in the number of cases involving pupil appearance, participation in demonstrations, and distribution of literature on campus. Twenty-three of the 28 cases fall under these three topics.

One of the most important cases in the area of pupil rights was decided by the Supreme Court in 1969. In Tinker v. Des Moines Independent Community School District, the High Court reversed decisions of the lower federal courts which upheld a school-board policy against wearing black armbands by pupils as an expression of protest. This policy had been promulgated when the board became aware of a planned demonstration against the war in Viet Nam. The Supreme Court found no evidence that the school authorities had reason to expect that the wearing of the armbands would interfere with the work of the school or impinge upon the rights of other pupils. In ruling for the pupils, the Supreme Court said that pupils "may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views."

Of the seven cases concerned with pupil appearance, six involved regulations on male hair length and style. The seventh decision struck down a California high-school regulation prescribing uniforms for female students. Five of the six courts that considered the question of haircut regulations, found the particular regulation invalid. The sixth, a federal district court in Indiana, found that the student's appearance caused disturbance and disruption of the educational process both in the academic classroom and during the physical education

TABLE 1.--MAJOR ISSUES INVOLVING PUPILS IN 1969

State	Admission and attendance	School desegregation	Pupil discipline	Pupil injury	Religion/ sectarian education	Transportation	Miscellaneous	Total decisions
1	2	3	4	5	6	7	8	9
Alabama	...	3	4	...	...	...	1[a]	8
Arizona	...	...	...	...	...	...	1[b]	1
Arkansas	...	9	...	...	...	...	...	9
California	...	...	3	...	...	...	2[a/c]	5
Colorado	...	2	...	...	...	...	...	2
Connecticut	...	...	...	1	...	...	...	1
District of Columbia	...	1	...	...	...	...	...	1
Florida	...	3	...	...	...	...	...	3
Georgia	1	6	...	...	...	...	...	7
Hawaii	...	...	...	...	1	...	...	1
Illinois	...	3	1	1	...	...	1[d]	6
Indiana	...	...	1	...	...	...	...	1
Iowa	1	...	1	...	...	...	...	2
Kansas	...	...	...	...	...	1	1[c]	2
Kentucky	...	...	1	...	...	1	...	2
Louisiana	...	14	1	...	...	...	2[b/e]	17
Maryland	1	...	...	...	...	...	...	1
Massachusetts	...	...	1	...	...	...	...	1
Michigan	1	1	...	2	1	...	...	5
Mississippi	1	7	1	...	...	...	...	9
Missouri	...	...	1	...	...	...	...	1
Nebraska	...	...	...	2	...	...	...	2
New Hampshire	...	...	...	...	1	...	...	1
New Jersey	...	...	...	1	...	...	...	1
New Mexico	...	...	...	2	...	...	...	2
New York	3	1	5	2	...	1	6[f]	18
North Carolina	...	8	...	1	...	1	...	10
North Dakota	1	...	...	...	...	...	...	1
Ohio	1	...	2	...	1	...	...	4
Oklahoma	1	...	...	...	...	...	...	1
Pennsylvania	...	...	1	1	...	...	...	2
South Carolina	...	3	...	...	...	...	...	3
Tennessee	...	2	1	...	...	...	1[a]	4
Texas	...	...	...	...	...	...	1[g]	1
Vermont	...	...	...	1	...	...	...	1
Virginia	...	3	...	1	...	...	1[d]	5
Wisconsin	...	...	4	...	...	1	...	5
Total number of decisions	11	66	28	15	4	5	17	146

a/ Involved regulation of campus speakers.
b/ Concerned high-school athletic program.
c/ Questioned search of a pupil's locker.
d/ Questioned constitutionality of state financing program.
e/ Involved a college requirement that girls live in dormitories.
f/ One case involved a locker search, one was concerned with college board examinations, one questioned required immunizations for school, another case involved the right of students to publish an advertisement in the student newspaper. Two cases concerned local governing boards in New York City.
g/ Action concerning rights of high-school pupils to join fraternities and sororities.

classes. The court concluded that although the student's conduct may have been protected under the First Amendment, his substantive due process rights were not infringed because his conduct directly and materially interfered with a vital interest of the state.

Campus demonstrations occurred at many schools during 1969 and resulted in numerous court suits by expelled or suspended students. For students at tax-supported institutions the general standards of procedural due process applied by the courts are that the school must inform the student of the charges against him with enough specificity to enable him to prepare a defense, the student must be permitted to present evidence, cross examine witnesses and have legal counsel. Should the school not provide the student with a fair hearing, the disciplinary action taken against him will generally be nullified by the courts unless and until a fair hearing is provided.

A few courts have also considered the issue of the legality of suspending students pending the hearing on the ultimate disposition of the case. The issue arose twice in federal district courts in Wisconsin, where it was held that before a student could be suspended there would have to be a preliminary hearing on the issue of the suspension pending the full hearing. Interim suspensions should only be imposed, the court said, when the presence of the student on campus constitutes a danger to other students, faculty or staff members, administrators, or college property.

A community college in New York sought an injunction against students, faculty members, and organizations participating in an extended sit-in at a college building. The court did not agree with the argument of the demonstrators that the building was a public facility that they could occupy if they wished. An order was entered prohibiting the demonstrators from assembling in such a manner as to interfere with the normal operation of the college.

Publications on campus, authorized or unauthorized, played a part in four decisions. The U. S. Court of Appeals for the Fifth Circuit declined on the ground of mootness to decide if Troy State University could deny readmittance to the student editor of its newspaper after he substituted his own editorial for the one approved by the faculty advisor. The student had decided not to re-enter the school which left no justiciable controversy.

Two Illinois high-school students sued to have their expulsions declared unconstitutional. The two had been expelled for distributing a publication critical of the school administration on school grounds. The Court of Appeals for the Seventh Circuit held that reasonable action by school officials which is necessary to maintain order and discipline is permissible even though this may to some degree infringe upon freedom of speech and press. After reconsideration by the entire court the decision was reversed.

Two federal district courts in New York denied students relief after they had been disciplined for distributing unauthorized material on school grounds. In the first case, the court held that the student's conduct toward school authorities followed a pattern of gross disrespect and flagrant and defiant disobedience. His suspension was upheld. The second case involved a student who was transferred for distributing a forged issue of the student newspaper. The court denied the student's application for a preliminary injunction to retransfer him to his former school. The court felt that the student would be entitled only to the requested relief after a trial on the merits.

Pupil Injury

In 1969, as in past years, pupil injury produced much litigation. The 13 decisions under this topic came from 10 states. Governmental immunity as a defense against tort liability of school districts was struck down in Nebraska. In a case involving a student injured at a track meet, the Supreme Court of Nebraska allowed recovery, stating that a governmental body is "not immune from tort liability arising out of a physical condition, affirmatively and voluntarily created by the public body on its premises, where the existence of the condition is not reasonably visible or apparent, and where the condition constitutes an unreasonable risk of harm to persons authorized to use and using the premises for the purposes intended."

Religious Issues

The constitutionality of state laws providing bus transportation to nonpublic-school children was challenged in three states during 1969. In two states, Ohio and Michigan, the statutes were upheld by state courts as not violating the federal or state constitutions. In both cases the reasoning used by the Supreme Court in Everson v. Board of Education (67 S. Ct. 504, (1947)) was applied and the statutes were found constitutional. The statutes were also found to have satisfied the Supreme Court test in Schempp for permissible legislation in that they had a secular purpose and a primary effect of neither advancing nor inhibiting religion.

In Hawaii, however, the statute and the board of education rule authorizing bus transportation to nonpublic-school pupils were declared invalid. The highest state court held that the statute and regulation violated the state constitution provision that no public funds shall

be "appropriated for the support or benefit of any sectarian or private educational institution." The court did not find the Everson decision applicable, for unlike the Hawaii constitution, the New Jersey state constitution did not proscribe such activity.

In New Hampshire the state senate submitted questions to the state supreme court regarding the constitutionality of proposed legislation providing aid to nonpublic schools. Applying the Schempp test the court found that partial exemption on real estate to parents of nonpublic-school children would be unconstitutional. However, other proposed legislation which would provide transportation, child benefit services such as school doctor and nurse, and a bill to provide textbooks were found to be permissible legislation.

Miscellaneous Cases

In Alabama, California, and Tennessee, the question of the right of colleges and universities to bar certain speakers from the campus was raised. The students were successful in all three instances in having the respective college regulations declared unconstitutional as a violation of the students' First Amendment rights.

High-school students in New Rochelle, New York, were successful in their effort to publish an advertisement in opposition to the Viet Nam war in the student newspaper after the principal had directed that it not be published. The federal district court held that it was patently unfair in the light of the free speech doctrine to close the newspaper to the students.

Three of the criminal cases included in this report concerned the admissibility of evidence found in students' lockers. In the California case the search for drugs was conducted by the vice-principal without a warrant and without the consent of the student. The court found the evidence admissible since the school stands in loco parentis and has joint control over the locker along with the student. In the Kansas and New York cases the locker searches were made by police officers who were seeking evidence of a burglary in the former case and drugs in the latter case. In both cases the searches were held to be valid and the evidence admissible. Both searches, which were consented to by school authorities, were ruled permissible under the theory that students do not have exclusive control over their lockers vis-a-vis school authorities.

During 1969, two published cases involved school children who challenged the state statutes in Illinois and Virginia under which state funds were apportioned to local school districts. In the Illinois case, McInnis v. Shapiro, the pupils asserted that only a financing system that apportioned public funds according to the educational needs of the pupils could satisfy the Fourteenth Amendment. The federal district court agreed that the system in effect produced inequalities but did not agree that the inequalities amounted to invidious discrimination. The complaint of the pupils was dismissed. The Supreme Court of the United States affirmed the lower court decision.

The Virginia case, Burruss v. Wilkerson resulted in a three-judge federal court being convened to hear the charges of the school pupils that the state financing system resulted in discrimination against poorer counties. In convening the three-judge court, the district court was unable to say that the constitutional issues raised by the pupils were wholly without merit. Subsequent court action resulted in a decision against the pupils, which decision was later affirmed by the Supreme Court.

ADMISSION AND ATTENDANCE

Georgia

Davis v. Georgia State Board of Education
408 F. 2d 1014
United States Court of Appeals, Fifth Circuit, March 11, 1969; rehearing denied April 3, 1969.

(See Pupil's Day in Court: Review of 1968, Davis v. Ware County Board of Education, p. 32; Review of 1967, Peagler v. Thegpen, p. 9.)

A group of rural school children and their parents sought an injunction to require the state of Georgia to allow them to transfer from the Ware County schools to the Clinch County schools (said to be nearer their homes) and to appropriate to the latter county the state aid and minimum foundation funds which would normally go to Ware County. They alleged that other such transfers of children and funds had been allowed and invoked the equal protection clause of the Fourteenth Amendment. The district court dismissed the complaint on the ground that no federal question was presented.

Previous attacks had been made by these parents on the reorganization of the Ware County school system in the state courts. No relief had been granted in any of the cases.

In the present appeal, the federal appellate court said that basic to any complaint of denial of equal protection must be some showing that two similar groups are being treated differently and that this different treatment is without rational basis or is based on some invidious factor such as race. Since the parents and children had not claimed that they came under some state provisions for transfers and were still denied transfers or that the other children who were allowed to transfer did not come under any of the provisions for transfer, the court held that their complaint presented no substantial federal question for determination. Therefore, judgment of the federal district court in dismissing the complaint was correct.

Iowa

Clarke v. Redeker
406 F. 2d 883
United States Court of Appeals, Eighth Circuit, February 14, 1969.

(See Pupil's Day in Court: Review of 1966, p.10.)

A former student appealed from the dismissal of his complaint by the lower court. The student alleged that he had been charged the nonresident tuition rate at the University of Iowa from 1964 to 1967 and that during this period he was a resident of Iowa and snould not have been charged the higher nonresident rate. He sought damages, including punitive damages, and a refund of excess tuition paid.

The trial court dismissed the complaint because the student had already prosecuted a similar suit to final adjudication. The only difference here was the remedy sought, namely damages. In the prior case the student sought an injunction against the enforcement of the tuition regulations. In that case, the court held that the student was a resident of Iowa for tuition purposes as of September 1966, and directed the university to refund any excess tuition paid after that date.

In the present appeal, the court held that the fact issue of when the student became a resident of Iowa for tuition purposes had already been decided and the student was bound by that decision. Since the issue was adjudicated, the judgment of the trial court in dismissing the complaint was correct.

Maryland

Cecil County Board of Education v. Pursley
251 A. 2d 205
Court of Appeals of Maryland, March 12, 1969.

The board of education appealed from a decision of the trial court which enjoined the bussing of children from one school to another. The children had formerly walked to school and now were bussed to another school. Their parents brought the suit, alleging that the bussing was a waste of the taxpayers' money. The bussing had been instituted following the completion of two new elementary schools which required that attendance zones be redrawn. Actual transportation costs were lower than the preceding school year.

The trial court found that the action of the board was not fraudulent, corrupt, or an abuse of discretion, but apparently was of the opinion that since it must necessarily cost more to transport pupils than to allow them to walk to school, there was a waste of public funds, and,

therefore, the board's action in requiring the transportation as part of the redistricting plan was arbitrary.

The higher court disagreed, saying the testimony disclosed there were many factors, such as estimated growth and class size, which the board properly considered in making the decision to redraw school boundary lines. "A consideration of all of those factors could well lead the members of the Board as reasonable persons to conclude that it was for the best interests of the educational system in the county" to spend the money to transport the children. The court said further that although an increase in cost in transporting children to school would not in itself be insufficient to show arbitrary conduct by the board or a waste of money in this case, the facts indicated that the transportation costs actually decreased following the redistricting.

The court ruled that there was no evidence before the lower court that the board acted improperly or in breach of its trust, and, therefore, the injunction should not have issued. The decision was reversed.

Michigan

Shapiro v. Public Schools of City of Ann Arbor School District
165 N.W. 2d 919
Court of Appeals of Michigan, Division 2, December 19, 1968.

A 17-year-old high-school student who lived with her older sister brought an action for a court to direct her tuition free admittance to the Ann Arbor public schools. The trial court denied relief and an appeal was taken.

The appellate court found that the girl's father was able to provide a suitable home for her in the school district of his residence and that the student lived in Ann Arbor for an educational purpose. Further, the action of the school district in refusing tuition-free admission was not arbitrary or without just reason. The judgment of the lower court was affirmed.

Mississippi

Perry v. Grenada Municipal Separate School District
300 F. Supp. 748
United States District Court N.D. Mississippi, W.D., June 20, 1969.

Two unwed mothers brought suit against the school district, challenging a board policy of refusing admission to unwed mothers. Three issues were considered by the court. The first involved the question of jurisdiction. The court ruled that there was adequate authority for the fact that a federal district court can assume jurisdiction over a school matter where there is a charge of violation of constitutional rights, regardless of whether the charge has racial implications. It had been previously stipulated by the parties that the policy was enforced in a nondiscriminatory manner.

The second issue involved was the propriety of a class action. The court ruled that a class action was inappropriate since there was no evidence that the class of unwed mothers who were seeking admission to the Grenada schools was so numerous that it met the requisites of the Federal Rules. The case was thus considered on the basis of the two girls only.

The final and principal issue was whether the school policy of denying admission to unwed mothers violated the equal protection clause of the Fourteenth Amendment.

The court made it clear that lack of moral character was adequate reason for excluding a child from school, but it did not believe that having one child born out of wedlock should forever brand the mother as undeserving of any chance of rehabilitation or the opportunity for future education.

The court held that the girls could not be excluded from school for the sole reason that they were unwed mothers; and that they were entitled to readmission unless on a fair hearing before the school authorities, they were found to be so lacking in moral character that their presence in the schools would taint the education of other students.

New York

Nistad v. Board of Education of the City of New York
304 N.Y.S. 2d 971
Supreme Court of New York, Richmond County, October 14, 1969.

A junior high-school pupil sought an order directing the board of education to hold classes as usual on October 15, 1969. The day in question had been designated Viet Nam "War Moratorium" day. The board of education had issued a statement that teachers and pupils who wished, as a matter of conscience, to participate on that day in planned programs outside the schools would be permitted to do so. The pupils would not be charged with an absence, and the teachers would be permitted to charge the day against their personal leave.

The pupil argued that this board action violated his right of freedom of speech in that it illegally compelled him to profess his views on this conflict.

The court held that the board had no power to act in an area which touched on matters of opinion and political attitude, and that it acted unconstitutionally. In the opinion of the court the element of compulsion was clear, for pupils and teachers who did not attend school on that day would be deemed to be against the government's war policy and those who did attend would appear to be in favor of that policy. The resolution of the board forced people to take a position when, as a matter of constitutional law, they were not required to do so.

Nor could the board relegate to itself the power to decide what was or was not an "issue" of great moral magnitude. The court said that the board had no business to "recognize" as it did in its statement, the desires or differences of the American people on the Viet Nam War and how best to end it.

Accordingly the court ordered the board to rescind its resolution permitting the absence from school and to issue a directive stating that the public schools would be open on October 15, 1969, in the usual and normal manner.

Silverberg v. Board of Education of Union Free School District No. 18
303 N.Y.S. 2d 816
Supreme Court of New York, Nassau County, September 8, 1969.

A mother sought an order directing the board of education to register her son in the first grade. She claimed that he was qualified to bypass the public kindergarten because of his previous private-school kindergarten record. As a matter of declared policy the board would not admit a child to the first grade unless he had satisfactorily completed a year of kindergarten in a duly registered kindergarten or one which provides substantially equivalent instruction. The private kindergarten which the child attended had not been registered with the State Education Department. The board advised the mother to register the child in the public kindergarten pending the results of tests designed to determine if his private kindergarten preparation was substantially equivalent to the instruction received at a public school.

It appeared to the court that the board was acting within the policies of the State Education Department and had not based its decision solely on the fact that the child would not be six years old by December 1969.

The court found that the decision of the board not to register the child in the first grade until the results of the tests were known was not arbitrary, capricious, or unreasonable. Accordingly the petition of the parent was dismissed.

Stillman v. School District
304 N.Y.S. 2d 20
Supreme Court of New York, Special Term, Nassau County, Part I, September 26, 1969.

An 18-year-old high-school senior sought a judgment directing either of two school districts to admit her as a student. The girl asserted that she was a resident of Garden City and that her parents were divorced, and that under a separation agreement she was permitted to choose to live with either parent or to live alone. The student completed her junior year at Rockville Centre where she lived prior to her parents' divorce. Because of the distance between her present residence and the school she had attended, she sought to register in the Garden City school. On being denied admission, she tried to return to the Rockville Centre high school, but was told she could not be admitted because she was a resident of Garden City.

The student claimed that she was being deprived of her constitutional right to complete her education. The Garden City school district contended that the student had not exhausted her administrative remedies and for this reason the action should be dismissed. On this matter the court ruled that an appeal to the state commissioner of education was not an exclusive remedy and that an action in court was proper.

The court found that the parents had emancipated the girl by having given up custody and the right to recall the child at any time. Consequently the court concluded that the child had an independent residence and should be admitted to the Garden City schools.

North Dakota

Walker v. Peterson
167 N.W. 2d 151
Supreme Court of North Dakota, April 19, 1969.

Parents of school children living in North Dakota sought a determination that state school officials and the Selfridge school district were required to allow their children to attend school in South Dakota and to pay their tuition and transportation costs to the out-of-state schools. The trial court entered judgment in favor of the parents, and the defendants appealed.

The decision turned on the interpretation of the North Dakota statute which provided that pupils "from areas historically attending school in a bordering state...shall be permitted to continue attending school in a district in a bordering state." The statute applied to pupils in districts that had been annexed or reorganized.

Most of the pupils in question resided in the former Walker school district. In 1963, when that district ceased operating its own school, the children attended school in South Dakota. In 1964, the old Walker district was annexed by the Selfridge school district. Mostly through persistent appeals the children continued to attended school in South Dakota.

The parents contended that they were from an area which has historically sent its children to school in a bordering state. The school district, on the other hand, contended that it does not have to pay the tuition and transportation costs; that the statutory language in question is ambiguous and impossible to interpret; and that nowhere does the statute say who is to decide what children have historically attended school in another state.

The court held that although the word historically as used in the statute might well refer backward in time to the establishment of the school district, in the instant case the period of time of two, four, or five years during which the pupils from the areas involved attended school in South Dakota was not a sufficient period of time to come within the meaning of the word historically. Judgment of the lower court was reversed.

Ohio

State ex rel. Whittington v. Barr
249 N.E. 2d 773
Supreme Court of Ohio, July 2, 1969.

The parents of a minor child sued for a court order to require the school board to either admit their son to the high school or to pay for a tutor to enable him to continue his education. The boy had been convicted of a felony and was out on bond pending his appeal. The terms of the release made specific provisions for his attendance at school. The board of education, however, had passed a regulation stating that any child charged or convicted of a wrongful act, such as a felony, would be excluded from attendance at the district schools until he is exonerated by the legal authorities. A lower court had issued the order and the school board appealed.

However, on the same day that the original motion for the court order was filed, the board of education passed a resolution providing for the payment of a tutor for the boy and provided that accreditation be given for the courses completed. In view of the board's compliance with the relief the parents asked for, the higher court ruled that the case was moot as of the date of the original hearing and the order should not have been issued.

Oklahoma

Board of Education of Independent School District No. 2 of Noble County v. Maris
458 P. 2d 305
Supreme Court of Oklahoma, August 27, 1969.

The school board brought proceedings seeking to reverse an affirmance of a lower court order which granted applications of mothers of five children to transfer them to other schools. The county superintendent of schools had originally denied the transfer applications. State laws provided that applications for transfers shall be granted only when the topography of the district or the health of the child is such that the best interest of the child cannot be served by his attendance in the district in which he lives.

The applications of four of the pupils contained statements from doctors that it would be in their best interests to attend a school different from the one to which they were assigned. The application of the fifth contained no statement. The appellate court was of the opinion that neither the statments of the doctors nor the testimony of the parents was sufficient to meet the statute's requirement of a health certificate. Nor was there a sufficient showing made with reference to the topography to meet the requirements of the statute. According to the court, the distance from the school and the length of the bus trip involved were matters of "convenience" and were not reasons for transfer.

The court held that the superintendent had been correct in denying the transfer applications and reversed the judgment of the trial court.

SCHOOL DESEGREGATION

Alabama

Davis v. Board of School Commissioners of Mobile County
414 F. 2d 609
United States Court of Appeals, Fifth Circuit, June 3, 1969: rehearing denied June 20, 1969.

(See Pupil's Day in Court: Review of 1968, p. 24; Review of 1966, p. 14.)

The district court entered an order formulating and approving a desegregation plan from which the Negro pupil-plaintiffs appealed.

The plan included attendance zone lines for grades 1-8 in the city portion of the Mobile school district. As to this feature, the appellate court said that these were drawn on a nonracial basis but that no conscious effort was made to locate attendance zones to eliminate past segregation. The court ordered that the zones be redrawn because the record and statistics proved the zones were constitutionally insufficient.

The freedom-of-choice plan for high-school students approved by the lower court was also found insufficient in that it failed to comply with the previous order of the appellate court that there be no distinction between elementary and high-school students.

The district court had included a minority-to-majority transfer provision. The appellate court held that while the converse would be acceptable, the provision of the district court was impermissible because it was tantamount to an authorization to resegregate the schools.

Also found impermissible was the freedom-of-choice provision approved for the rural portion of the school district because only 6 percent of the rural Negro school population had chosen to attend the formerly white schools and no white pupils chose to attend the Negro schools.

The construction of new schools that was permitted by the lower court was enjoined by the appellate court. The court said that construction would have to wait until after the new attendance zones were drawn to ascertain the need at that time.

The decision of the district court was reversed, and that court was directed to order the school board to consult the U.S. Department of Health, Education, and Welfare in formulating a new plan. If HEW approved the new plan, the court was directed to approve it also. If no plan was agreed upon between HEW and the school board, HEW was to be requested to submit a plan. The court directed that the new plan be completed and approved by August 1, 1969, so that it could be implemented for the 1969-70 school year.

Lee v. Macon County Board of Education
292 F. Supp. 363
United States District Court, M.D. Alabama, E.D., August 28, 1968.

(See Pupil's Day in Court: Review of 1968, p. 25; Review of 1967, p. 15; Review of 1966, p. 16; Review of 1964, p. 20; Review of 1963, p. 14.)

This case had been before the court on previous occasions. In these proceedings, an effort was made by Negro pupils and the United States to require 76 of the Alabama school systems covered by the original court order to take additional affirmative action to achieve unitary school systems not based upon race. Specifically the motions sought to have the court require the school systems to take action pursuant to the principles enunciated by the Supreme Court of the United States in Green v. County School Board of New Kent County, Virginia (88 S. Ct. 1689 (1968)) designed to bring about a more prompt disestablishment of dual public school systems.

The 1968-69 school year was the second year of operation of freedom of choice in the school districts covered by the 1967 court order. Based upon reports filed with the court, progress had been made in desegregating the schools and faculties. The state superintendent of schools and the governor had required each of the systems to adhere closely to the provisions of the plans that had been adopted. The court was impressed with the way that these officials were approaching the problem of desegregation.

In the Green case the Supreme Court of the United States held that under the facts there presented, freedom of choice was not a satisfactory method of school desegregation. It was also stated by the Supreme Court in that case that there is no universal answer to the complex

problems of desegregation. The test of freedom of choice is its workability in the particular situation. In applying these principles to the instant case, the court found that freedom of choice had not yet completely disestablished the dual schools systems. However, for the time being, the members of the court were unanimous in their belief that freedom of choice was the most feasible method to pursue.

On the question of faculty desegregation in the school systems, the court said that the school boards had a legal duty to achieve faculty desegregation by compelling faculty assignments if voluntary transfers were insufficient to achieve racial balance in the schools. The court ordered specific minimum requirements for faculty desegregation for many of the systems effective for the 1968-69 school year.

The court also issued orders concerning schools and grades that operated with fewer pupils than required under the minimum-pupil standards set by the state department of education.

The court denied the motion of the pupils and the United States to the extent that they requested the court to order the abandonment of freedom of choice as a method of desegregating Alabama public schools. The court retained jurisdiction of the case.

United States v. Montgomery County Board of Education
Carr v. Montgomery Board of Education
89 S.Ct. 1670
Supreme Court of the United States, June 2, 1969.

(See Pupil's Day in Court: Review of 1968, p. 25.)

In March 1968, the federal district court had ordered the Montgomery County board of education to take immediate steps to further desegregate its public school system. The court had granted the Negro pupil-plaintiffs specific relief in the areas of faculty desegregation, student teachers, and substitute teachers. Its order provided that the board must move toward a goal whereby the ratio of Negro-white faculty members in each school is substantially the same as the over-all ratio in the system. Toward this end, the court set a specific, but gradual schedule with a fixed mathematical ratio based on race for the 1968-69 school year. The school board appealed to the U.S. Court of Appeals, Fifth Circuit, specifically objecting to that portion of the decree that fixed the mathematical ratios. That court concluded that the standards for faculty desegregation cannot be inflexible and held that the district court decree should be interpreted to mean "substantially or approximately" the 5-1 ratio set by the lower court.

On further appeal, the Supreme Court of the United States found that the plan entered by the district court was not intended to be absolutely rigid and inflexible. The Supreme Court felt that the original plan was entered in the spirit of its opinion in Green v. County School Board in that the plan "promises realistically to work, and promises realistically to work now." The Supreme Court believed that the modifications ordered by the Court of Appeals, while not intended to do so, would "take from the order some of its capacity to expedite, by means of specific commands, the day when a completely unified, unitary, nondiscriminatory school system becomes a reality instead of a hope."

The judgment of the Court of Appeals was reversed, and the case remanded with directions that the judgment of the district court be reinstated.

Arkansas

Cato v. Parham
403 F. 2d 12
United States Court of Appeals, Eighth Circuit, November 8, 1968.

Negro school children appealed from the decision of the district court (293 F. Supp. 1375, 1968) which gave the Dollarway school district until December 1, 1968, to prepare a plan to disestablish the dual school and convert to a unitary system that would be effective for the 1969-70 school year. Litigation to achieve a unitary system began in 1959. Up to 1968, the freedom-of-choice method of desegregation operated by the district had minimal results. The pupils sought to advance the implementation of the desegregation plan by one semester as well as to increase attorney fees over those allowed by the lower court.

The circuit court of appeals agreed with the lower court that the school board's present freedom-of-choice plan was not adequate. However, the appellate court saw little gain in repairing the deficiencies of that plan, nor did it think that there was sufficient time prior to the beginning of the second semester to restructure the school district without harm to pupils by the disruption of classes and teachers. The court accepted the assurance given by the counsel for the school board that would bring forth an adequate plan. In the event the board did not do so by December 1, 1968, the district court could exercise its discretion in order to implement a unitary plan for the 1969-70 school year.

With regard to the attorney fees, the court said that the amount awarded was fully within the discretion of the district court. The amount would not be disturbed absent a record showing evidential abuse.

The judgment of the lower court was affirmed, and the case was remanded for its continued jurisdiction.

Cato v. Parham
297 F. Supp. 403
United States District Court, E.D. Arkansas, Pine Bluff Division, March 26, 1969.

(See case immediately above.)

Negro pupils filed objections to the latest desegregation proposal of the Dollarway school district for the 1969-70 school year submitted pursuant to a court order. They contended that the new proposal which was based on residential attendance zones would perpetuate de facto racial segregation.

The school district consists of Dollarway which is bisected by Highway 65 and the Hardin area which is separated from Dollarway by portions of another school district. The district operated two complexes of grades 1 through 12, each on a separate campus, each situated near the highway on opposite sides about a mile apart, and one additional elementary school attended primarily by the children from the Hardin area. The bulk of the white population lives west of Highway 65 and most of the Negro population lives east of the highway. The population of the Hardin area is almost entirely white. The district had slightly more Negro than white pupils.

The desegregation plan of the board proposed to assign all of the pupils living west of the highway to the formerly white Dollarway complex, and all pupils residing east of the highway to the previously all-black Townsend Park complex. Hardin area pupils in grades 1-5 would attend Pinecrest elementary school, and those in grades 6-12 would attend the Dollarway schools. Some faculty desegregation had been achieved, and the board expected additional progress for the 1969-70 school year.

The court found that the attendance zones in the proposed desegregation plan had been adopted on the basis of studies made by the district school superintendent. He testified that the plan had been devised without consideration of race in determining the boundary lines. He later conceded that race had been considered. The court said that if the racial nature of this case could be ignored and "if the District's schools could be viewed simply as 'schools' and the inhabitants of the District simply as 'people' the Court would have little, if any, trouble with the zones established by the plan." However, the racial nature of the case could not be ignored. The schools were still racially identifiable. The district was required to disestablish the unconstitutional dual school system and replace it with a unitary system not unconstitutionally discriminatory. If that end is accomplished, the district court would not be concerned with the means used. The court noted that the school district had been directed to eliminate the dual system, but that it had not been mandated to use a residential zoning plan.

Based on the record, the zoning plan could not be approved by the court. It pointed out that while the number of Negro and white pupils in the district were about equal, only 5.8 percent of the pupils in the Townsend Park schools would be white if all of them attended the schools to which they were assigned; and at the Dollarway complex, only 18.4 percent of the pupils would be Negro.

As to faculty desegregation, the court felt that the board's plan to have the racial composition of the faculty reflect the racial composition of the student body was insufficient. The court was of the opinion that if the board adequately restructured the school system, faculty desegregation would probably be solved along with pupil desegregation.

The Negro pupils who brought the suit had urged that all pupils in the elementary grades attend Dollarway schools, that all secondary students attend the Townsend Park schools, and that the Pinecrest school be used for special instruction. The superintendent argued that this plan would not be feasible because of the cost involved in converting secondary schools into elementary schools and vice versa. The court answered the objection by saying first that the obligation to integrate cannot be avoided by a plea of poverty and secondly that the board was not necessarily required to adopt the plan put forward by the plaintiffs. However, the court thought that as a minimum a unitary high school must be established. The court noted that the district was of moderate size and that the operation of two high schools created needless duplication of instruction, and both schools tended to suffer as to educational quality. For the elementary schools, attendance zones were not ruled out although the court doubted that Highway 65 would be a permissible boundary.

The court entered a decree disapproving the board's plan and directing the school district to present a plan to the court by May 1, 1969.

Cato v. Parham
302 F. Supp. 129
United States District Court, E.D. Arkansas, Pine Bluff Division, July 25, 1969.

(See cases above under this title.)

Following the court directive, the school board presented a new plan for the desegregation of the Dollarway school district. The new

plan proposed the establishment of a single unitary high school for grades 10-12 on the formerly all-white Dollarway campus. It also proposed to assign pupils in grades 1-9 on the basis of the same attendance zones as were previously disapproved by the court. The court rejected this plan for the elementary and junior high levels and also found that the plan lacked specificity as to faculty desegregation. The board then presented another plan to which the Negro pupils objected.

The second plan proposed to assign children in grades 1-9 on the basis of residence, using the railroad tracks that ran east of the highway as the dividing boundary line. Pupils east of the tracks would attend the formerly Negro Townsend Park schools and those west of the tracks would attend the Dollarway school or the Pinecrest school. Pupils living between the tracks and the highway could choose their school. There was a majority-to-minority transfer plan. Teachers were to be assigned so that at least 25 percent of the faculty in any school would be of a race different from the majority. For the 1970-71 school year, grades 7-12 would be at Dollarway with the elementary grades remaining the same as before. No additional faculty desegregation was contemplated. The shifting of the boundary line from the highway to the tracks would send substantially more Negro pupils to the Dollarway schools and would decrease the number of white children attending the Townsend Park schools.

The court accepted the plan for faculty desegregation for the 1969-70 school year, but ordered the board to achieve and maintain complete faculty desegregation for the 1970-71 school year and subsequent years.

The court also accepted the plan for pupil desegregation as it applied to grades 10-12, but rejected the remainder of the plan because the 29 percent Negro enrollment it would produce at Dollarway would be insufficient to achieve racial balance; moreover, only tokenism would exist at Townsend Park. However, the court stated the situation could be rectified at the junior high-school level if the board were in a position to place all pupils in grades 7-9 at the Dollarway campus in 1969-70. But because of financial and other reasons, the court allowed the board to continue the attendance zones for grades 7-9 with the understanding that a unitary junior high school would operate on the Dollarway campus in the 1970-71 school year.

Grades 1-6 presented a different problem. The court was convinced that no rational attendance zones could be laid out that would achieve integration of these grades. According to the court, this case then presented the question of the constitutional permissibility of geographic attendance zones in school districts with segregated housing where schools were built in accord with the neighborhood school concept and pupils assigned on the basis of zones that reflected neighborhood racial make-up. The court was unwilling to give approval of the zones established along neighborhood lines. For the 1969-70 school year, the court ordered the board to assign no fewer than 200 white pupils, exclusive of the pupils who lived between the highway and the tracks, to the Townsend Park complex. The board could use any method it chose for fulfilling this directive, including redrawing zones, paring schools, or busing. For the 1970-71 school year, the board was directed to find a permanent solution with respect to the elementary-school pupils.

The amount of the attorney fees previously allowed to the plaintiffs was increased. The court said that if the school district desired to appeal this decision on the question of the geographic attendance zones, it would stay that portion of the decree which ordered the transfers to the Townsend Park schools. The board was warned, however, that unless it was under the protection of a stay when school opened in the fall, there must be compliance with the decree.

Graves v. Board of Education of the North Little Rock, Arkansas, School District
299 F. Supp. 843
United States District Court, E.D. Arkansas, W.D., April 29, 1969.

Negro school children challenged the sufficiency of the school district's plan for desegregation based partly on freedom of choice and partly on zoning. For an indefinite time in the future the district proposed to continue to assign elementary pupils on the basis of freedom of choice. The district had considered but rejected zoning and pairing as alternatives. Junior and senior high school students were to be assigned in accordance with geographical attendance zones. The zone plan, however, would not be fully operational until 1970-71 when the last of the grades at an all-Negro senior high school were phased out. The court found that the zones were rationally laid out by reference to natural boundaries, to the locations of the schools, and to the residences of the pupils to be served.

With regard to faculty desegregation, the court said the plan amounted to nothing more than a pledge that the district would refrain from racial discrimination in hiring, compensating, promoting, demoting, and discharging professional employees.

The court ruled that the over-all plan was not acceptable either as an interim or a permanent plan. Were the plan to be put into effect, only token desegregation of the faculty would

occur; the elementary schools would remain essentially segregated, one senior high school would remain all-black and two of the five junior high schools would be all-white.

The court said that it was the duty of the board of education to desegregate its faculty despite possible unwillingness of some white teachers to teach in Negro schools. The court did not impose mathematical percentages for faculty desegregation, but rather advised the district that abstract good intentions were insufficient without concrete proposals. The board must proceed to take steps to integrate the staff with or without a teacher's consent and in addition must be prepared to employ Negroes at higher administrative levels.

With regard to the elementary schools, the court reiterated the recent holdings of the Supreme Court of the United States which made it clear that freedom of choice was acceptable only if it was capable of producing integration. The court did not agree with the board that alternatives to freedom of choice did not exist for elementary pupils and suggested zoning with a majority-to-minority transfer provision.

The court did allow the board to phase out the all-black high school gradually. Further, it found the proposed attendance zones for the junior and senior high schools to be acceptable, for despite some imbalance that would exist, the zones would eliminate all-Negro schools.

A decree was entered enjoining the further operation of a dual school system, approving the junior and senior high-school attendance zones, and disapproving the plan as far as it concerned the elementary schools and the faculty. The district was directed to file an amended plan not later than May 15, 1969.

Graves v. Board of Education of the North Little Rock, Arkansas, School District
302 F. Supp. 136
United States District Court E.D., Arkansas, W.D., July 25, 1969.

(See case immediately above.)

Pursuant to the order of the court in the case above, the school district filed another desegregation plan on May 15, 1969. The new plan proposed to assign elementary-school pupils by zones. The Negro plaintiffs objected to the plan, asserting that it would still leave the elementary schools racially identificable. The proposed plan would result in 10 all-white schools, one all-black school, and substantial integration in only one of the remaining nine. The court said that it was evident that geographic zoning would not desegregate the elementary schools because they were built in residentially segregated areas as part of the neighborhood school concept. The court found that the entire elementary subsystem would remain basically segregated.

While the court did not believe that the Constitution requires every school in a subsystem to be completely integrated, it held that the zoning plan which left an entire subsystem essentially segregated could not be approved. The court did not attempt to tell the board what it must do because of the absence of controlling guidelines from the circuit court of appeals. The court noted that complete integration of the elementary schools would require massive bussing; that the city had a limited public transportation system and the school district had no busses and no present prospective funds with which to lease or buy them. Under all of the circumstances, the court permitted that district to utilize the attendance zones for the elementary school for one year only.

With regard to faculty desegregation, the school district proposed to transfer teachers so that there would be not less than 15 percent nor more than 85 percent Negro teachers in any one high school. The board also asserted that when the closing of the all-black senior high school was completed, the faculty would be essentially balanced within the junior and senior high schools. As to the elementary schools, the district proposed to assign teachers so that there would be not less than 25 percent no more than 75 percent Negro teachers in any elementary school. The court said that while the provisions did not amount to complete faculty desegregation, it was substantial progress and because of the short time prior to the opening of school, further progress would not be insisted upon for the current school year. For the following year, the court felt that the minimum the district would have to achieve would be a majority of white teachers in every school because the district had a majority of white teachers in the system.

The pupil-plaintiffs objected to the court allowing the board to phase out the Negro high school rather than ordering its immediate closing. The court adhered to the previous order, but cautioned the school board about the possible discharge of employees of that school, and enjoined the board from practicing any discrimination against any of the employees there with respect to continued employment after the school is closed. The board was ordered to make a proper evaluation of all employees of the school prior to entering into employment contracts for the following year.

White parents of school children had petitioned to intervene in the action. They were protesting the distance their children would have to walk because of the attendance zones for the elementary schools. The court denied the motion, saying that while it was not

unsympathic, there was nothing that it was willing to do at that time.

Haney v. County Board of Education of Sevier County, Arkansas
410 F. 2d 920
United States Court of Appeals, Eighth Circuit, May 9, 1969.

(See Pupil's Day in Court: Review of 1968, p. 27.)

Negro parents and school children appealed from the decision of the district court which held that the schools in the two school districts involved in this suit were not segregated. One district is all white, the other all black. The all-Negro Sevier District No. 1, is made up of two noncontiguous areas almost completely surrounded by the all-white Lockesburg School District. The two districts resulted from a 1948 law which forced consolidation on all districts of fewer than 350 pupils. At that time schools in Arkansas were segregated by state law. Lockesburg residents have voted in favor of consolidation of the two districts, Sevier voters have not. The lower court concluded that the districts were not created for the purpose of segregation, that there was no proof of gerrymandering and that Sevier would admit white children if any lived in the school district. Therefore, the Sevier District was not segregated. The lower court also noted that consolidation of schools was prohibited under Arkansas law without the consent of the electorate of both school districts.

The appellate court rejected this reasoning and held that the two districts were segregated because at the time they were created, Arkansas law required segregated public schools. The court said that "political subdivisions of the state are mere lines of convenience for exerising divided governmental responsibilities. They cannot serve to deny federal rights."

Having found that the two school districts were originally segregated under color of existing state law, the court said the school authorities are charged with an affirmative duty to integrate their schools, faculties, and transportation facilities. Accordingly, the case was reversed and remanded to the district court with directions that the board of education of Sevier County present a workable plan to effectuate a unitary school system for the 1969-70 school year.

Jackson v. Marvell School District No. 22
416 F. 2d 380
United States Court of Appeals, Eighth Circuit, October 2, 1969, rehearing denied October 28, 1969.

(See Pupil's Day in Court: Review of 1968, p. 28.)

The Marvell school district began desegregation in 1965 with the adoption of a freedom-of-choice plan approved by the district court and subsequently by the circuit court of appeals. In 1968, the Supreme Court of the United States decided the Green trilogy of cases which held freedom of choice to be an acceptable method of desegregation only if it worked. Following those decisions, the Negro school children in this case requested the district court to require the Marvell school board to adopt a plan which would eliminate freedom of choice.

The district court concluded that in light of Green the plan then in operation could not stand and ordered the school board to propose an alternate plan for the conversion to a unitary system. Instead, the school board filed a report taking issue with the order of the court and asserting that there was no feasible alternative to freedom of choice, that if the court order was not recinded, the white pupils would flee the school system. The district court then modified the previous order and permitted freedom of choice to continue for the 1969-70 school year. The Negro pupils appealed.

The appellate court noted that according to recent decisions a freedom-of-choice desegregation plan can receive judicial approval only if it offers a genuine promise of promptly and efficiently eliminating the dual school system and if it is the most feasible one available to the school district. The appellate court found in this case that freedom of choice was not eliminating the dual school system. The court rejected as insufficient the argument of the school district that freedom of choice was the only feasible plan in that any other plan would result in a white pupil boycott of the public schools. It is settled law that public opposition to a plan is not a valid consideration.

The order of the district court was vacated, and the case was remanded with directions that the lower court require the school district to propose a plan that would eliminate the dual system and all vestiges of freedom of choice no later than January 1970.

Kelly v. Altheimer, Arkansas Public School District No. 22.
297 F. Supp. 753
United States District Court, E.D. Arkansas, Pine Bluff Division, March 24, 1969.

(See Pupil's Day in Court: Review of 1967, p. 21.)

Negro school children sought to enjoin the continued operation of a freedom-of-choice plan by the school district. Following the Green trilogy of cases the district had been directed to file a desegregation plan that would convert the school system to a unitary, nonracial one. The district had previously operated two 1-12 complexes, one all-black, the other predominantly white.

The report filed by the school district indicated a preference for continuing to utilize freedom of choice but it would alternatively restructure the school system so that one complex would be an elementary school and the other a high school. Attendance at each would be district-wide. The report filed by the district also had the results of a poll that the district had taken which indicated that both Negro and white patrons of the school district preferred freedom of choice and that a majority of the white pupils would leave the school system if the schools were fully integrated. White teachers had indicated that they would resign if the alternative plan were imposed. The school district contended that under these circumstances it should be allowed to continue to operate under freedom of choice.

The court answered these contentions by saying that even if the predictions of the school district were taken as fact, the school district could not continue to operate as it had been, for the appellate court had made it clear that the dual system at Altheimer had to be abolished. The integration of the public schools is no longer a matter of local option.

The court held that it could not allow the school district to operate under a freedom-of-choice method particularly since the district does not now contend that this method would in the forseeable future, if ever, bring about integration. The alternative plan proposed by the district was ordered adopted. The district was also admonished by the court not to assign pupils and teachers to classrooms in such a way as to create racial segregation in the restructured system.

United States v. Lovett
416 F. 2d 386
United States Court of Appeals, Eighth Circuit, October 2, 1969; rehearing denied October 31, 1969.

School district Number 1 in Warren, Arkansas, began its desegregation attempts in 1964 when it was faced with a threatened cutoff of federal funds. For three years it operated a freedom-of-choice plan that achieved only minimal integration. In the spring of 1967, the U.S. Department of Health, Education, and Welfare informed the district that the desegregation plan was insufficient. In February 1968, the district was again informed that it must have an adequate plan for desegregation for the 1968-69 school year. The district submitted a plan that would have continued free choice until the 1970-71 school year. HEW rejected the plan because of the delay in implementation. Further negotiations followed until the parties agreed on a plan providing for a unitary system for all grades, to be implemented in September 1970 if a bond issue for a new high school passed or in September 1969 if the bond issue failed.

At that point a group of white citizens obtained a temporary injunction in a state court which halted the implementation of the HEW-approved plan. The United States Government brought suit in federal court against the school district and the white citizens. The federal district court relieved the school district of the obligation to follow the state court injunction. It also permitted the school district to continue free choice and found it unnecessary to order the implementation of the HEW plan. Instead, the court ordered the school district to file a plan with it by November 1, 1968. The Government appealed from this decision.

At the time the appeal was reached, the school district had a unitary system for grades 1-8, but still operated a free-choice method for grades 9-12. The bond issue for the new high school had failed, and the school district had made no other provisions for desegregating the high school. The dispute between HEW and the school district centered on the time-table for desegregation. The appellate court felt that the district court should have ordered the establishment of a unitary system for the 1968-69 school year. Since it was clear to the appellate court that freedom-of-choice was not working and that there were no further reasons for delaying integration, the district court was directed to require the school district to file a plan that would convert the present school system into a unitary, nonracial system. All vestiges of the freedom-of-choice provisions were ordered eliminated, and the new plan was to be fully implemented and effective no later than January 1970. Those portions of the district court order that were inconsistent with this decision were reversed.

Colorado

Keyes v. School District No. One, Denver, Colorado
303 F. Supp. 279
United States District Court, D. Colorado, July 31, 1969.

Negro school children in Denver sought a temporary injunction against the school officials to enjoin implementation of a school-board resolutions designed to reduce segregation in the Denver public schools. The school authorities denied that there was any actionable segregation in the schools and maintained that segregation, if any, resulted from housing patterns and natural migration. The evidence showed that over the past decade, the schools in northeast Denver had become more and more segregated. The policies of the board had done nothing to alleviate this condition. A study of the problem was begun in 1962 and reported in 1964, but nothing further was done. In 1968, the Second Study Committee filed a report which noted intensified segregation in the northeast schools

and made recommendations that no more schools be constructed in that area. Finally in January 1969, following the presentation of a plan of school integration by the superintendent, the school board adopted three resolutions. These were designed to reverse the segregation trend by boundary changes which would have achieved racial balance. Some preliminary efforts had been made by the superintendent and his staff to implement the resolutions. However, following a school-board election there was a change in the composition of the school board; on June 9, 1969, the resolutions were rescinded by the new board and the old order was restored.

The court made additional findings of fact concerning the Denver public schools, among them that the result of the rescission had the purpose and effect of segregating the schools. The court did not find that the purpose included malicious or odious intent but that the action was taken with knowledge of the consequences which were substantially certain. The court said that under such conditions, the action was unquestionably willful.

The court said that in this case it was not faced with simple or innocent de facto segregation. As was shown, during the 10-year period preceding the resolutions, the Denver school board carried out a segregation policy in that it maintained, encouraged, and continued segregation in the public schools despite the mandate of Brown. The school board had an affirmative duty to take positive steps to remove the segregation that developed as a result of its prior affirmative acts. The three resolutions were a response to this duty, and their rescission must be rejected as arbitrary state legislative action. The court rejected the contention of the school officials that the rescission represented the will of the people, saying that efforts to accomodate community sentiment or the wishes of the majority could not justify the abandonment of the Constitution.

The court concluded by saying that "under the Fourteenth Amendment, the plaintiffs, as citizens of the United States, have the right to be protected from official action of state officers which deprives them of equal protection of the laws by segregating them because of their race." The action taken by the board was ruled unconstitutional and enjoined. The motion for preliminary injunction was granted.

Keyes v. School District No. One, Denver, Colorado
303 F. Supp. 289
United States District Court, D. Colorado, August 14, 1969.

(See case immediately above.)

The school board appealed the case above to the Tenth Circuit Court of Appeals. That court remanded the case, questioning the sufficiency of the injunctive order in terms of its specificity and directing the district court to consider Title IV of the 1964 Civil Rights Act.

The district court made supplemental findings of fact about the schools covered by three rescinded school-board resolutions. It found that between 1960 and 1969 the board's policies with respect to the northeast Denver schools showed an undeviating purpose to isolate the Negro pupils. In adopting the three resolutions the board recognized its constitutional responsibility to desegregate these schools. The court found further that the resolutions constituted legitimate legislative action designed to remove segregation by means that were both moderate and responsible in light of existing conditions, and that the rescission was taken with little study, it was not justified in educational terms, and the only stated purpose was that of keeping faith with the will of the majority of the electorate.

The court continued the preliminary injunction and enjoined the school officials from any action that would modify the status quo as it existed prior to the rescission. The court further ordered the school officials to make effective the integration policies as set out in the three resolutions with some changes. The board was not ordered to transport pupils if that was not necessary.

The court then considered the applicability of Section 407 of the 1964 Civil Rights Act. This section provides that no official or court is empowered to order a school district to transport pupils to achieve racial balance. The court concluded that this section did not limit the power of the court to direct the school board to implement the resolutions to the extent ordered. The section was construed to apply to actions brought by the Attorney General. The court said that the legislative history of the section indicated that the proviso meant that the Congress was not taking a position on the question of the propriety of transporting pupils to achieve racial balance in a case of de facto segregation. The court concluded that the instant case was one in which the board had actively contributed to the segregation in the schools. "It would be inconsistent to construe the proviso as a limitation on the power of the courts to correct a deprivation of rights which Section 407(a) itself is intended to remedy." Where unconstitutional purposeful segregation is found, the section did not apply.

District of Columbia

Smuck v. Hobson
408 F. 2d 175
United States Court of Appeals, District of Columbia Circuit, January 21, 1969.

(See Hobson v. Hansen in Pupil's Day in Court: Review of 1967, p. 24.)

This appeal challenged the lower court decision which found that certain practices of the

board of education in administering the District of Columbia schools were unconstitutional. The appeal was brought by Hansen, who had resigned as superintendent of schools, Smuck, a member of the board of education, and certain parents who sought to intervene in the action. The board of education itself was not a party to the appeal, having decided against pursuing that course.

The court first considered whether the individuals had standing to appeal the lower court decision. The court ruled that whatever standing Hansen would have had to appeal as superintendent was lost when he resigned that position. It said that the original decision was not a personal attack on him and as a resigned superintendent he was not bound by it. His intervention in the action was, therefore, unwarranted. The same decision was reached with regard to Smuck. As a member of the board of education he had an opportunity to participate in the decision not to appeal. The decision of the board was made by a collective vote, and an individual member has no right to appeal. Smuck was dismissed as a party.

The court granted the motion allowing the parents to intervene in the appeal on the grounds that if the decision should become final without a hearing on appeal, the parents would have no way to pursue their interests, and the parents had proved that they would be affected by a final disposition of the action. The court concluded further that the parents had shown a sufficiently serious possibility that they were not adequately represented in the decision of the school board not to appeal. The asserted interest of the parents was that the new school board should be free to make policy decisions. Therefore, their interest extended only to those parts of the order which imposed on the board. Because of this and the absence of the school board as a party, the court limited its review to those features of the lower court order which limited the discretion of the board.

After disposing of other procedural questions, the appellate court turned to the provisions of the district court opinion. The first permanently enjoined the board of education from discriminating on the basis of racial or economic status in the operation of the school system. The appellate court said that this was declaratory of basic constitutional requirements which did not improperly impair the freedom of discretion of the school board.

The second provision directed the school board to abolish its optional zones which gave pupils a choice of which of two schools they would attend. The trial court found that these optional zones had been created to give white children the opportunity to transfer out of the school they would normally attend to attend one that was all-white or more nearly all-white. According to the appellate court the findings were not clearly erroneous since discriminatory intent was supported by the record. Therefore, the elimination of these optional zones was an appropriate remedy for the segregation that resulted from them.

The third general area contained in the trial court decree was faculty integration. The board had been ordered to provide for substantial faculty integration immediately and to file with the court a plan for full faculty integration in the future. The trial court concluded that while Negro teachers had been hired and promoted without bias, an intent to segregate played a role in teacher assignments. The parents objected to that portion of the decree that required compulsory reassignment of teachers. The appellate court did not read the opinion to contain this "mandatory injunction." The actual decree required substantial integration now and a long-range plan for full integration in the future. The court felt that the trial court simply believed that at some future date mandatory reassignment would be required to achieve full faculty integration. This being so, mandatory assignment was a mere prediction which would not be necessary if other methods of achieving faculty integration accomplished the end. The court pointed out, however, that "racial prejudice on the part of teachers, who are employees of the government, is not a valid justification for continued segregation."

The court next considered those portions of the trial court decree which directed that transportation be furnished for volunteering pupils who wished to transfer from overcrowded schools east of Rock Creek Park to schools with available space west of the park, and which directed the board to submit a long-range plan of pupil assignment that would alleviate racial imbalance in the schools. The appellate court noted that in ordering these changes, the trial court did not attack the neighborhood school concept, but did find a notable inequality of educational resources and facilities between predominantly black schools and those schools that had more white children. The bussing requirement was premised on the finding that the school board has not shown that the cost of providing such transportation justified the denial of equal educational opportunities to Negro children. Since the school superintendent had testified in favor of bussing at the pupils' expense to relieve the overcrowding, the court felt that the parents were traveling a fine line in arguing that the cost of transportation impaired the freedom of discretion of the school board. The court concluded that when the differentiating factor between schools is as clear as overcrowding versus excess capacity, transportation can be required of the board.

The court also concluded that the long-range plan of pupil assignment required by the trial court did not impinge the discretion of the

board. The school board was directed to explore alternatives, such as educational parks and the pairing of schools, but these were advisory rather than mandatory. Residential patterns and the preponderance (92 percent) of Negro pupils in Washington may defy the best efforts of the school board to achieve racially balanced schools, and the long-run solution may lie in a more broadly based school district extending beyond the borders of the District of Columbia. The court could see no reason for the parents to object to efforts of the board to enlist voluntary cooperation of other school districts or to make special efforts to prepare disadvantaged children, nor was there any basis for saying that the district court references to the need for such efforts curtailed the discretion of the school board. What the parents sought were assurances that the neighborhood school policy would be maintained, the court noted, and the decree permitted its retention where it did not result in overcrowding or inequality of facilities. In the view of the court the provisions of the decree did not improperly restrict the discretion of the board of education.

Lastly, the appellate court considered the provision of the decree ordering that the "track system" of ability grouping used in the Washington schools be abolished. The trial court had concluded that the excessively rigid separation of pupils in different classrooms made each a self-contained world; that education provided in the lower tracks was extremely watered down; that an excessive reliance on intelligence tests standardized by white middle-class norms made initial assignments erratic in terms of the professed goals of the system; and that the schools did not encourage pupils to "cross-track" and did not review track assignments to make reassignments where initial error had occurred or later became appropriate. The parents challenged these findings as well as their constitutional significance.

The court declined to rule on these challenges, reiterating that the parents were before the court only to protect the freedom of the board to use the widest possible discretion in setting educational policy. The court took the decree of the lower court to mean that the "track system" as it existed at that time had to be abolished, but it was clear that the decree permitted full scope for ability grouping.

In refusing to modify the portion of the decree relating to ability grouping, the appellate court concluded that "this directive does not limit the discretion of the school board with full recognition of the need to permit the school board latitude in fashioning and effectuating the remedies for the ills of the District school system."

In the opinion of the appellate court the order entered by the trial court did not require modification to meet any of the challenges of the intervening parents. However, in view of the change in the composition of the school board, the case was remanded to the trial court to make sure that plans filed by the out-going board did not in any way prevent the new board from evolving new programs.

Florida

Augustus v. School Board of Escambia County, Florida
299 F. Supp. 1069
United States District Court N.D. Florida, Pensacola Division. April 21, 1969.

As had been requested, the school board presented an amended desegregation plan to the court for approval. The plan left to the decision of the court whether two schools should be paired. The court ordered the pairing, stating that under the law it is the duty of the school board, when confronted with alternatives, to adopt the one tending most to promote integration, and that pairing the schools will best accomplish this.

The court noted that under the plan submitted, there would be no all-black schools but there would be schools with all or almost all-white pupils. The court found that this resulted from population location and from natural and geographic, rather than historical, boundaries. Further, while bussing might possibly have eliminated the racial imbalance in these schools, the school district was in economic straits and did not have the funds to accomplish this. Considering this, the plan was acceptable as written.

Although the majority-to-minority transfer provision was ordered broadened, the court was of the opinion that the plan submitted gave "realistic and meaningful promise of a unitary school system effective now."

Suggestions had been made by other parties as to modifications of the zone lines and other changes. The court did not wish to further delay the adoption of a plan, but told the school board to consider the suggested changes, to put into effect those changes complying with the order of the court that hasten and further the prompt attainment of a completely unitary school system in the most practicable and economically feasible way possible.

The plan, as modified by the court, was approved.

Board of Public Instruction of Duval County v. Braxton
402 F. 2d 900
United States Court of Appeals, Fifth Circuit, August 29, 1968.

This case began in 1960 when Negro pupils sought desegregation of the Duval County public

schools. In this latest appearance the board appealed from a decree of the district court which contained a provision permitting pupils to transfer from the school in which their race was in the majority to one in which their race was in the minority. The board attacked this portion of the decree as racially discriminatory.

The appellate court held that the majority-to-minority transfer provision was a constitutionally valid and appropriate step toward disestablishing the dual system of segregated schools in Duval County. In so holding, the court noted that the desegregation plans proposed by the board up to this point did not result in anything beyond token desegregation. The court found no merit in the argument of the board that race may not be taken into account in transfering pupils, and said, "In some situations, there is no way of undoing the effects of past discrimination except by taking race into account."

The decision of the lower court with respect to the transfer policy was affirmed, but the case was remanded to enable the district court to reconsider the entire desegregation plan in the light of more recent decisions of the Supreme Court of the United States.

Pate v. Dade County School Board
303 F. Supp. 1068
United States District Court, S.D. Florida, Miami Division, August 29, 1969.

A suit was filed in federal court to desegregate the Dade County schools. A court order was issued in that case in 1960 which provided in part that the court retain jurisdiction for such time as may be necessary to put the desegregation plan into operation and for determination as to whether further proceedings were necessary. The case then lay dormant.

In 1969, the U.S. Department of Health, Education, and Welfare notified the Dade County school system that it was not in substantial compliance with the Civil Rights Act concerning desegregation. The school district was directed to eliminate its dual system no later than September 1970. In accordance with his directive, the school board developed an interim plan which was approved by HEW pending receipt of a final plan. The board then began preparations to operate under the interim plan for the 1969-70 school year.

Portions of the plan and steps to implement it met with public opposition, and several law suits were filed in Florida state courts. The first of the suits challenged the elimination of an all-black school and alleged that the action of the board was arbitrary and capricious and a violation of the "government in the sunshine law." This law required that any official action taken by a state agency be taken in public proceedings and that a written record be made. The school board petitioned the federal court that the case be removed to it, alleging that the case was one of exclusive federal jurisdiction. The federal court heard the motion and remitted the case to the state court for consideration of issues of state law, but retained jurisdiction of the case for determination of any federal questions. An injunction was then issued by a state court judge who found that the "government in the sunshine law" had been violated and declared the action of the board void.

While this ruling pertained to one part of the plan, the way was opened for the entire plan to be declared void. The federal court then accepted jurisdiction, saying that the voiding of an interim plan providing for more integration was unquestionably a federal question. Further, the court had retained jurisdiction over the Dade County schools for the purpose of supervising desegregation from the 1960 order.

The federal district court found that the interim plan did not meet constitutional standards in that it contemplated the operation of all-black schools contrary to the decision in the Green case. However, since only a few days remained before the reopening of the schools for the 1969-70 year, the plan was approved. All persons were enjoined from any attack on the plan except by appellate review. The school board was directed to furnish within 30 days the results of a study delineating the administrative feasibility of total disestablishment of the dual school system at the elementary and junior high-school levels at the beginning of the second semester of the 1969-70 school year. The board was also directed to submit a plan by March 1, 1970, for the elimination of the dual system in grades 10-12 no later than September 1970. The court retained jurisdiction.

Georgia

Acree v. County Board of Education of Richmond County, Georgia
294 F. Supp. 1034
United States District Court, S.D. Georgia, Augusta Division, December 26, 1968.

(See Pupil's Day in Court: Review of 1968 p. 31.)

This case began in 1964 when the first attempt was made to desegregate the public schools of Richmond County. None of the previous plans submitted by the school board had achieved more than minimal desegregation. The current appearance of the case in the court centered on the motion of the pupil-plaintiffs to require the board to present a new plan with unitary, nonracial zones or "pairing," with a target date of February 1, 1969.

The board had presented alternatives at the court hearing; one was zoning, the other was freedom of choice. The board took the position that the zoning plan was the least desirable of the alternatives. At the conclusion of the hearing, the court tentatively ruled that the present freedom-of-choice system was impermissible and that a geographical attendance zone be effectuated. The date for implementation of a new plan was extended to the opening of the 1969-70 school year.

The court pointed out that the Supreme Court decision of the Green case did not forbid freedom of choice, but rather limited it to those instances where it contributed to the achievement of a unitary system. Accordingly, the court said that it would give consideration to a plan formulated by the board which combined automatic assignment of pupils within designated geographical zones and a limited freedom of choice of schools.

Concerning faculty desegregation, the court noted that portion of the Jefferson decree which placed the burden of faculty desegregation upon the school board to go beyond the mere solicitation of volunteers.

A time-table was set up by the court for the filing of the desegregation plan.

Acree v. County Board of Education of Richmond County
301 F. Supp. 1285
United States District Court, S.D. Georgia, Augusta Division, July 14, 1969.

(See case immediately above.)

Pursuant to the order of the court in the case above, the board of education filed a desegregation plan consisting of geographic attendance zones with limited freedom of choice in three zones. The pupil-plaintiffs objected to the plan in toto. They contended that the evidence showed that the board had made little effort to dismantle the segregated system in Richmond County. They further maintained that the principals and faculties were still assigned to the schools on a segregated basis.

The court reiterated decisions of the Court of Appeals for the Fifth Circuit which said that geographic zones were acceptable only if they tended to disestablish rather than reinforce the dual system of segregated schools. The court observed that what the attendance zones would accomplish was uncertain, and said that while the board had proceeded in good faith, it did not approach zoning with the purpose of producing greater integration. This it must do. But because of the limited time prior to the opening of school for the 1969-70 school year, the plan was temporarily approved.

The board of education was directed to apply to the Office of Education of the U.S. Department of Health, Education, and Welfare for professional counseling and assistance, looking to development of a satisfactory and legal plan at an early date. The court wished to have the recommendations from HEW by October 1, 1969, and stated that a hearing would be held on any new plan before it was approved.

The court further ordered that 40 additional teachers be assigned to teach at schools in which their race was in the minority for the 1969-70 school year. More integration on the staff level was also ordered, but the court fixed no minimum for the board to follow.

Adams v. Mathews
403 F. 2d 181
United States Court of Appeals, Fifth Circuit, August 20, 1968.

(See page 29.)

Graves v. Walton County Board of Education
300 F. Supp. 188
United States District Court, M.D. Georgia, Athens Division, May 14, 1968. Memorandum opinions and decree July 30, 1968.

Negro parents, school children, and teachers in the public schools of Walton County brought suit against the county board of education and its superintendent, the Social Circle Board of Education, its superintendent, and the chief of police. They charged that the schools were being operated on a racially segregated basis, that three teachers had been unjustifiably suspended, and that the chief of police was threatening parents of children in the Social Circle schools who spoke out about conditions at the school. The defendants denied the allegations and counterclaimed for injunctive relief alleging in substance a conspiracy of the parents to disrupt the operation of the schools.

The court did not rule on the merits of the freedom-of-choice desegregation plan which had been operating for two years. However, both sides were given the opportunity to apply to the court for a hearing on any proposed changes in the plan.

The three teachers involved in the case had been suspended from an all-Negro school for nonperformance of duty. Injunctive relief was sought only for two; the third had resigned. The teachers had been suspended when they refused to return to their classrooms after being instructed to do so by the county school superintendent. The teachers' reason for leaving their classrooms and not returning to them as ordered was that visiting parents who were at the school to protest conditions asked them to remain while they conferred with the superintendent. They were offered a formal hearing before the board, but suit was filed prior to that time. The court noted that no one,

including those protesting alleged grievances, had the right to disobey a valid state law during the protest. The court held that the case of the teachers failed completely in the matter of proof that they were suspended for insisting upon exercising their right of free speech in regard to racial matters. The court found that they were suspended, not because they protested, but because they left their classrooms and refused to return. The court also ruled that the teachers were not entitled to relief because they had not exhausted their administrative remedies. No federal rights of the teachers were violated, and under the facts of this case the court felt that their appeal to court was premature.

The complaints against the police chief were also found to be completely unsubstantiated, and injunctive relief as to him was denied.

The counterclaim of the school officials was also denied on the ground that the conduct of the parents was not a basis for a cause of action in federal court for injunctive relief for two reasons: The conduct of the parents, although a conspiracy, did not amount to one purposefully calculated to deprive others of the equal protection of the laws; and the city and county officials had no federal right to be protected in the performance of their official duties.

Memorandum opinion, July 30, 1968.

A further hearing was held on the adequacy of the desegregation plan at which the school authorities recognized that sufficient progress had not been made under the freedom-of-choice plan. There was evidence that HEW had rejected another plan because it did not provide adequately for the desegregation of two schools. The latest plan before the court abandoned freedom of choice and provided for five rigid attendance zones and combined two of the zones. The court found no evidence of any gerrymandering for racial or other reasons, and approved the adoption of the plan. The court invited the school authorities to file a proposed decree, and invited the plaintiffs to file any objections they might have to the proposal.

The parents and the pupils interposed two objections to the proposed plan. The first objection related to zoning. The parents urged that there be further consolidation of the zones. The school officials defended their action on the grounds that zone 2 was a rapidly growing area and would need a school. The court agreed with the school officials, but noted that if it should develop in the long run that the lines should be redrawn, the courts would be open. The second objection was that one high school would remain predominantly black for one year. The school board had proposed this because of the nearness of the opening of school for the fall term and the difficulty of closing a high school. The following year the school would be converted to a junior high school and all pupils in the zone would attend the school. The court accepted the proposal of the school board.

Further orders were entered regarding pupil assignment, faculty integration, and activities and programs. The board was directed to achieve substantial desegregation of faculties for the 1968-69 school year. The board was also directed to file reports with the court showing the progress of pupil and faculty desegregation. Jurisdiction for the purpose of implementation was retained.

Graves v. Walton County Board of Education
410 F. 2d 1152
United States Court of Appeals, Fifth Circuit, April 11, 1969.

(See case immediately above.)

Negro school children and their parents appealed from the judgment rendered in the case above. The question on appeal was whether the district court erred in failing to include in the decree an order for periodic demographic surveys of the county. Plaintiffs argued that this provision was necessary because of the Walton County zoning plan for desegregation.

The appellate court held that there was no abuse of discretion on the part of the lower court and affirmed the opinion.

Graves v. Walton County Board of Education
410 F. 2d 1153
United States Court of Appeals, Fifth Circuit, April 11, 1969.

(See cases above under this title.)

An appeal was taken from that portion of the district court decree which denied injunctive relief to the two suspended teachers. One argument was that the fact-findings of the district court were erroneous. The appellate court found no error since the findings made it clear that the absence of the teachers from the classrooms did not become nonperformance of duty until they were requested to return to their classrooms and refused to do so.

The second argument that the district court did not give due consideration to the abridgement of the teachers' First Amendment rights was likewise rejected. The appellate court said it was clear that while the teachers' ability to make their views known at a certain time and in a certain place was nullified by the superintendent; nevertheless, it could not be said that their rights of free speech were violated. The ability of the teachers to make known their

views was not halted, merely postponed. Moreover, the action of the superintendent had the effect of regulating conduct, not stemming speech.

United States v. Board of Education of Lincoln County
301 F. Supp. 1024
United States District Court, S. D. Georgia, Augusta Division, July 9, 1969.

The United States and Negro school children and their parents sought an injunction against the continued operation of a segregated school system by the Lincoln County board of education. Lincoln County had two 12-grade schools, one all-black and the other 99.3 percent white. The system operated a freedom-of-choice plan to desegregate the schools. Faculty desegregation was at a minimum. The school board maintained that neither a zoning nor a pairing plan would work, for the white pupils would flee the school system.

The plan offered by the school board proposed to transfer 75 Negro pupils to the white school for the 1969-70 school year, transfer three teachers of each race to the school predominated by the opposite race, unify the transportation system, and teach all French classes at the Negro school. Following the 1969-70 school year, the board intended to float a bond issue which would allow construction of a new senior high school which would serve all students. The two schools already in existence would function as a junior high and as an elementary school. The system would then be completely desegregated.

The court found that the present method of pupil assignment was clearly deficient according to judicial exposition of the Fourteenth Amendment. Continuing, the court said that the board's plan which contemplated continuance of freedom of choice in September 1969, and failed to provide for any substantial increase in faculty desegregation did not meet constitutional standards. While it is true that the plan envisioned a future bond issue which would enable the school district to totally desegregate, this, at best, was speculative, for bond issues do not always pass. The court said further that it "cannot allow what may happen at some indefinite future date to delay until tomorrow what the higher courts tell me must be done today." The strong possibility that the public school system in Lincoln County will consist only of Negro pupils in the future is inconsequential to the courts. The court found the plan submitted by the Lincoln County board of education to be unacceptable and enjoined it from further operation of a dual system.

The board was directed by the court to seek assistance from the U.S. Office of Education in development of a satisfactory plan to desegregate the schools.

Illinois

Rajala v. Joliet Grade School District No. 86
246 N.E. 2d 74
Appellate Court of Illinois, Third District, March 26, 1969.

A grade-school pupil sought a declaratory judgment that the school district had failed to comply with the Armstrong Act. That act requires that school districts shall create attendance units which will take into consideration the prevention of segregation and elimination of separation of children because of color, race, or nationality. The pupil alleged that 21 of 26 attendance units in the district were either 90 percent white or 90 percent Negro, and that no action had been taken to alleviate this situation.

The trial court dismissed the complaint because of the failure of the pupil to exhaust his administrative remedy. The act provided that upon the filing of a complaint with the state school superintendent by at least 50 school residents of the district or 10 percent, whichever is lower, alleging segregation of pupils, the superintednent is to provide a hearing and render a decision. If he so determined, he could request the state attorney general to apply to the courts for relief.

At the time this case was heard, another case was pending before the state supreme court which challenged the constitutionality of the Armstrong Act and raised the issue of exhausting administrative remedies. The instant case was delayed until after the disposition of the case before the higher court.

The state supreme court ruled that the Armstrong Act was constitutional, but did not rule on the issue of administrative remedies. The lower court, however, had ruled that the provision in the Armstrong Act was not an administrative remedy which could be used to enforce the Act since the state school superintendent had no power to grant the relief sought.

The school district argued that the legislature did not intend that the administrative proceedings be bypassed. The pupil, on the other hand, argued that the Act put the onus on the school district to correct racial imbalance and not on the state superintendent. The pupil also argued that although the state supreme court had made no mention of administrative remedies, its decision was based upon the entire record and, therefore, there was no requirement that an appeal be made first to the state school superintendent.

The court concluded that it must adhere to the prior decision of the state supreme court. It must be presumed that since the supreme court affirmed the action of the trial court in the case, it intended, also, to agree with the conclusion that the Act did not provide an exclusive remedy which must be pursued prior to filing an action in the court.

The judgment of the lower court was reversed, and the case was remanded to that court for trial.

United States v. School District 151 of Cook County, Illinois
404 F. 2d 1125
United States Court of Appeals, Seventh Circuit, December 17, 1968; rehearing denied January 27, 1969.

(See Pupil's Day in Court: Review of 1968, p. 34.)

The school district appealed from a preliminary injunction granted by the district court to desegregate its elementary schools. After lengthy hearings the district court had found that the school board had failed to take steps to overcome the effects of past racial discrimination and had engaged in purposeful segregation policies and practices. The district court concluded that this conduct violated the equal protection clause of the Fourteenth Amendment. An order was entered directing that predominantly Negro schools be disestablished and that the faculty be integrated.

In their appeal the school authorities contended that they were denied a fair hearing because the district court refused them adequate time to prepare their defense. The appellate court found no merit in this argument in that the school officials gave no reason why they could not have prepared their defense in the time allowed, nor did they show what would have been offered had they had more time. The court did not find that the denial of a continuance by the district court was an abuse of discretion.

The school officials also contended that they had no duty to bus pupils to achieve racial balance. The appellate court said that while it is true that the Civil Rights Act withholds power from officials and courts to order transportation of pupils from one school to another for the purpose of achieving racial balance, this does not apply to unlawful segregation of Negro pupils from their white counterparts solely because they are Negro. The bussing directed by the order of the district court was not done to achieve racial balance but to counteract the legacy left by the board's history of racial discrimination.

The school officials contended further that the district court order was erroneous under this appellate court's decision in Bell v. School City of Gary (324 F. 2d 209 (1963)). In response, the court said that the Bell neighborhood school doctrine was not controlling in the instant case. That doctrine presupposes an "innocently arrived at" de facto segregation with "no intention or purpose" to segregate Negro pupils from white. The appellate court said that the weakness in the argument of the school officials that the de facto pattern of segregation in the district came about innocently is that the district court did not find that the defendant-officials "inherited an innocent de facto segregation situation, but found that they inherited from their predecessors a discriminatorily segregated school system which defendants subsequently fortified by affirmative and purposeful policies and practices which effectually rendered de jure the formerly extant de facto segregation."

The final argument of the school board was that the lower court findings of purposeful, invidious, unconstitutional segregation were not supported by the record. The appellate court reviewed the findings and concluded that the school district had engaged in unconstitutional segregation, for there had been a deliberate pattern of state action in the bussing of pupils, assignment of teachers, selection of school sites, and drawing of attendance zones, all calculated to deny to the Negro pupils equal protection of the law. The preliminary injunction granted by the district court was affirmed, and the case was remanded to that court on the motion of the United States Government to make the injunction permanent.

United States v. School District 151 of Cook County, Illinois
301 F. Supp. 201
United States District Court N.D. Illinois, E.D., May 15, 1969.

(See case digest immediately above.)

Following the order of the appellate court in the case above, the district court made findings of fact and conclusions of law concerning the case. The preliminary injunction was made permanent, and specific orders were entered, as follows:

In the area of faculty and staff desegregation, the district court directed that race or color shall not be a factor in the hiring, rehiring, assignment, transfer, promotion, or demotion of faculty and professional staff members. The district was directed to assign teachers and staff in the 1969-70 school year so that no school would be identifiable as tailored for a heavy concentration of either Negro or white pupils. The court directed that the racial composition of the faculty and staff of each school should approximate the racial composition of the total faculty and staff in the system.

For the 1969-70 school year and thereafter until modified by the court, the board was directed to follow the specific boundary lines and pupil assignment provisions drawn up by the court. The board was directed to provide such transportation as would be necessary for the implementation of the order and to eliminate or consolidate those bus routes that overlapped or were duplicative because they had been designed to serve primarily white or Negro pupils.

The location of any new schools and any expansion of existing schools were to be made with the objective of disestablishing school segregation and eliminating the effects of prior segregation. Any plan or program for construction or expansion would have to be filed with the court and with the pupil-plaintiffs who would then have an opportunity to file objections.

The school board was directed to file with the court annual reports showing the racial composition of the faculty and the pupils for each grade and school in the system.

The court retained jurisdiction of the case.

Louisiana

Adams v. Mathews
403 F. 2d 181
United States Court of Appeals, Fifth Circuit, August 20, 1968; as modified and clarified on denial of hearing September 24, 1968.

Forty-four school desegregation cases from four southern states were consolidated on appeal. In each the issue was the same: Negro school children and their parents filed motions seeking to implement the decision in Green v. County School Board of New Kent County, Virginia (88 S.Ct. 1689) for 1968-69 school year and to secure the adoption of desegregation plans based upon geographic zoning, consolidation, and pairing of schools. In many of the cases the district court had held no hearing on the motion, and in none had the lower court made findings of fact on the effectiveness of the existing plan in the light of the Green decision.

The Supreme Court of the United States held in Green that school boards had "the affirmative duty...to come forward with a plan which promises realistically to work and promises realistically to work now." Freedom of choice was not ruled out, but it was to be watched closely by the courts for effectiveness.

The Court of Appeals sent all of the cases back to the district court for a full hearing and for findings of fact and conclusions of law as to the adequacy of the existing plans to convert from a dual system to a unitary nondiscriminatory system and whether the proposed changes would produce a desegregation plan that would work. If the district court concluded that the present plan was inadequate, the school district would be ordered to come up with a workable plan by November 28, 1968, to complete full conversion to a unitary nonracial system for the 1969-70 school year.

The appellate court granted a rehearing in the case of one school district (See Graves v. Walton County Board of Education, p. 25 of this report) where the pupils sought relief from segregation for the first time. The court allowed a high school to remain all-black under the desegregation plan for one year because the district had already opened for the year and the school in question would be closed the following year.

Conley v. Lake Charles School Board
293 F. Supp. 84
United States District Court, W.D. Louisiana, November 14, 1968.

(See Adams v. Mathews above.)

This case involved 30 of the school districts covered by the order of the U.S. Court of Appeals of the Fifth Circuit in Adams v. Mathews. (403 F. 2d 181). The district court had been ordered to make findings as to whether the freedom-of-choice desegregation plans of the school districts were adequate to convert to a unitary system in light of the Green decision. The school boards had no proposed plan. They operated under a circuit-wide uniform decree in conformity with the Jefferson decree.

The court found as fact the school boards were acting in good faith and that the Jefferson decree under which they had been operating since the fall of 1967, "has real prospects for dismantling the dual system 'at the earliest practicable date'."

Among its conclusions of the law the court noted that there might be other choices to the individual boards which will meaningfully assist freedom of choice to disestablish the dual system. Each board was told to reassess its own system and to report to the court by March 1, 1969, what additional courses were open to bring about the end result as required by Green.

Conley v. Lake Charles School Board
303 F. Supp. 394
United States District Court, W.D. Louisiana, June 5, 1969.

(See case immediately above.)

The court order in the case above was reversed by the U.S. Court of Appeals for the Fifth Circuit. The appellate court had entered an order that required each school board to formulate a new plan to bring about integration effective September 1969 that "'promises realistically to work now'." The appellate court order gave the district court the option of requiring a uniform plan for the school districts involved. The

district court agreed that a uniform plan was desirable and in the best interests of education.

The court ordered that all of the school districts submit to the Department of Health, Education, and Welfare their existing method of operation, along with proposed changes under the previous court order. The districts were given 30 days after the order to develop their new plan of operation insuring a unitary, nondiscriminatory system to become effective at the start of the 1969-70 school year. Any plan agreed upon by HEW and the school district would be approved by the court, subject to the right of plaintiffs to file objections and amendments within a specified time. If there was no agreement, both parties were instructed to file their recommended plans.

Hall v. St. Helena Parish School Board
303 F. Supp. 1231
United States District Court, E.D. Louisiana, Baton Rouge Division, June 9, 1969.

(See Pupil's Day in Court: Review of 1967, p. 29.)

The attorney of record for the plaintiffs and the Attorney General for the United States had sought further relief in eight school districts in Louisiana in the light of the Green decision. The district court denied any relief (303 F. Supp. 1224, (1969)) holding that the freedom-of-choice plans being operated by the eight districts under the Jefferson decree were constitutional. The Court of Appeals for the Fifth Circuit reversed the decision and remanded the case with specific instructions as to the decree that must be entered.

The district court judge was reluctant to enter the decree, holding to the belief that freedom of choice was a constitutional method of school desegregation. Pursuant to the mandate of the higher court the decree was entered ordering the eight districts in question to formulate a desegregation plan in cooperation with the Office of Education, U.S. Department of Health, Education, and Welfare, and to present that plan within 30 days. The plan was to become effective for the 1969-70 school year. If a plan could not be agreed upon by the parties, both sides would be given an opportunity to file plans.

Hall v. St. Helena Parish School Board
303 F. Supp. 1236
United States District Court, E.D. Louisiana, Baton Rouge Division, July 11, 1969.

Certiorari denied, 90 S.Ct. 218, November 10, 1969.

(See case immediately above.)

According to the order in the case above, desegregation plans for the eight school districts were submitted. There had been no cooperation with HEW. That agency filed a proposed plan for each of the school districts, and each school district independently presented a plan. The school district plans provided for a continuance of freedom of choice. The plans submitted by HEW showed a total departure from every vestige of freedom of choice.

The court reminded the school boards of the fact that freedom of choice was no longer an acceptable method of desegregation in the Fifth Circuit and that if they did not formulate a plan on their own, someone else would do it for them. Each of the school boards was given 10 days to prepare and present to the court a new plan for the operation of the schools. The districts were to take the plans of HEW and accept those portions that they could. Any portion of the HEW plan found unacceptable by the school board would have to be specifically rejected with reasons. The court order provided further that the final plan of each board "must present substantial and immediate progress toward the complete elimination of every all white school and every all negro school within the system...." The boards were also directed to make faculty and staff assignments with a view toward eliminating the racially identifiable schools. Additional orders pertained to transportation and the filing of reports with the court.

Moore v. Tangipahoa Parish School Board
298 F. Supp. 286
United States District Court, E.D. Louisiana, New Orleans Division, March 25, 1969.

(See Pupil's Day in Court: Review of 1968, p. 36.)

On October 15, 1968, this district court ordered the school board to file a desegregation plan for the 1969-70 school year by November 11, 1968 (298 F. Supp. 283). On that date the school board informed the court that it could not formulate a better plan than the one under which the system was then operating. The court then ordered the school board to seek assistance from the Educational Resource Center on School Desegregation in New Orleans, and to cooperate with that group in drawing up a plan which would eliminate segregation in the parish schools (298 F. Supp. 285).

In this action the school board sought an extension of time in which to review the plan prepared by the Center. The school board also suggested that after hearing other pending desegregation cases, the Fifth Circuit Court of Appeals could conceivably change the rule pertaining to school desegregation, and, therefore, the board should be relieved of planning any change in the operation of its schools for the 1969-70 school year until the cases were decided.

The court said that there was no more time for delay. Planning for the next school year

must be undertaken. The motion for an extension of time was, therefore, denied.

Moore v. Tangipahoa Parish School Board
298 F. Supp. 288
United States District Court, E.D. Louisiana, New Orleans Division, April 3, 1969.

(See case digest above.)

In this class action brought by Negro children to end the segregated school system in the parish, two groups of white children and their parents sought to intervene. Both groups contended that the school board did not adequately represent the interests of the white school children. Each group also maintained that it was more representative of the white children and their parents than the other.

The court first considered the question of intervention as a matter of right. If there is an absence of adequate representation of the intervenor's interest by existing parties, a rule of the Federal Rules of Civil Procedure allows intervention. The court felt that the representation of the petitioner's interest was adequate under the law.

The next question involved intervention by permission of the court, which the white parents sought alternately. The Federal Rules permit intervention upon timely application if it will not unduly delay or prejudice the rights of the original parties. The suit was already four years in process at the time application for intervention was made. Despite this fact, the court felt that the interests of the white parents and pupils were substantial and it was proper to allow intervention by a group subject to conditions designed to protect the interests of the original parties and to prevent further delay in the proceedings. The court believed that of the two groups seeking to intervene, one group more clearly represented the class of persons than the other, and its motion was granted. The motion of the other group was denied, but it was granted permission to file an amicus curiae brief.

Moore v. Tangipahoa Parish School Board
304 F. Supp. 244
United States District Court, E.D. Louisiana, New Orleans Division, July 2, 1969.

(See case digests above under this title.)

Pursuant to a previous court order, the school board requested the Educational Resource Center on School Desegregation to prepare a desegregation plan for the school district. However, the board opposed the adoption of the Center's plan as did the white parents who had intervened in the action. The board then presented the court with an alternate plan which did not comply with previous court orders. Following its disapproval by the court, the board submitted a new plan.

Five areas of the latest board proposal merited discussion by the court. The first proposal involved six high schools that would have operated under freedom of choice. The board argued that because four of these schools would be housed in buildings containing desegregated elementary schools, they would be desegregated schools. The court disagreed, noting that freedom of choice had not produced desegregation previously and that the six high schools would be racially identifiable. The fact that they would be housed in the same buildings as desegregated elementary schools would not change that fact. The high schools were ordered integrated for the 1969-70 school year.

The second proposal of the board would have continued racially identifiable elementary schools in one ward. The court rejected this feature of the plan, ruling that it did not meet constitutional requirements.

The board's plan did not specifically provide for classroom assignments. This was to be left up to each principal. The court found this assignment method to be proper, but directed that pupils be assigned to classrooms on a racially nondiscriminatory basis so that there would be no white classrooms or black classrooms.

The fourth proposal of the board was to assign boys and girls to separate schools in one ward and a portion of another. The court found no objection to this proposal, noting that separate education on a limited basis during a transitional period is not a denial of equal protection of the law.

Lastly, the court considered the proposal of the board that would assign all pupils in one community of the parish to separate schools by grade. The court recognized that the plan was unorthodox and would necessitate duplicative and complex bus routes. Further, the court noted that the board recognized this proposal as an experiment, believing that it may be the best method of providing transition to a racially nondiscriminatory school system in the community. In view of this, the court approved the proposal.

The intervening white parents urged that any plan ordered by the court would violate that section of the Civil Rights Act which prohibited a court from issuing an order that would require bussing to achieve racial balance. The court said, however, that its order was not being issued under the Civil Rights Act but under the equal protection clause of the Fourteenth Amendment in a suit brought by a private party. Moreover, the order did not require transportation except in those instances where the school board itself proposed to transport pupils, and the plan contained in the court's order would require

less bussing and for shorter distances than heretofore.

The amicus brief filed on behalf of another group of white parents urged that there was a constitutional right to a free choice of schools. The court rejected this argument as being historically incorrect and constitutionally inadequate. It noted that the freedom-of-choice method was a recent development to achieve desegregation of schools, but never an end in itself, and that it has not worked. Prior to its use, parents had no choice in the school that their children attended.

The court entered an extensive order providing for the desegregation of public schools of Tangipahoa Parish. All classroom assignments, facilities, and activities were to be operated on a racially nondiscriminatory basis. Provision was made for faculty assignments and bus routes. The board was directed to follow that portion of the Jefferson plan which provided remedial programs for pupils who previously attended segregated schools. The court retained jurisdiction.

Moses v. Washington Parish School Board
302 F. Supp. 362
United States District Court, E. D. Louisiana, New Orleans Division, July 2, 1969.

(See Pupil's Day in Court: Review of 1968, p. 36.)

The Washington Parish school board which had operated under a freedom-of-choice plan that had not produced significant desegregation, was ordered by the court to submit a plan which would eliminate five all-black schools for the 1969-70 school year. The new plan submitted proposed to divide the parish into seven districts with all of the pupils attending school in the district in which they resided, with the only exception being that in one district where the pupils would have the choice of two schools, one predominantly white, the other all-black. In addition, the board proposed to close four all-Negro schools, which would have resulted in severe overcrowding at two of the remaining schools. The issue regarding the closing of two of the schools was deferred until a subsequent hearing to afford the parties an opportunity to produce additional evidence with respect to the constitutional and administrative issues that may be involved.

As to the closing of the other schools not involving a serious problem of overcapacity, the court said the result of the closing was not per se discriminatory when the plan is considered as whole with the changes required by the court.

The court disapproved that part of the proposal which allowed freedom of choice to pupils in one district, for this would not satisfy the constitutional requirement of a fully desegregated unitary school system. The result would be one all-black school and one white school with few Negroes in attendance. For these reasons, the court was of the opinion that the two schools in this district be zoned with all of the pupils attending school in the zone in which they lived.

The court issued further orders relating to the complete desegregation of the classrooms, faculties, programs, activities, and transportation of the school system. The superintendent was ordered to report to the court annually the extent of the desegregation process. The court retained jurisdiction of the case for further relief if necessary.

Moses v. Washington Parish School Board
304 F. Supp. 1112
United States District Court, E. D. Louisiana, New Orleans Division, October 28, 1969.

(See case immediately above.)

The previous court order in this school desegregation case provided that the faculty could not be demoted or dismissed on a racially discriminatory basis. Five Negro tenure teachers who were not re-employed moved for an order of civil contempt against the school board and for an order to require the board to re-employ them and reimburse them for any salary lost for not being employed at the beginning of the 1969-70 school year. The school board contended that only four of the five were tenured. The court disagreed, noting that the letter of termination sent to the one teacher did not contain any mention of unsatisfactory performance as required by the tenure law. In the absence of such a notification, the court found that the teacher had tenure at the end of his three-year probationary period.

The letter sent to all five of the tenure teachers was identical in that it gave reduction in staff owing to integration as the reason for dismissal. At the hearing, the board attempted to prove incompetency as the reason for their dismissal. The court saw the issue as not whether the teachers were incompetent, but rather whether the previous court order had been violated by the failure of the board to re-employ the teachers. The court interpreted the previous order to mean that displaced personnel must be assigned to another position, and that tenure teachers could not be fired except for good cause pursuant to the procedures contained in the tenure statute.

The school board contended that the court lacked jurisdiction over the matter because the teachers had failed to pursue their administrative remedies. However, the board had failed to institute the proper proceedings against the teachers, and for this reason, the court said,

the board could not complain that the teachers did not exhaust administrative remedies. The court found that the board had technically violated the court order by failing to re-employ the teachers. A ruling on the civil contempt charges was reserved for 10 days to give the board time to comply with the order to rehire the teachers and reimburse them for lost salary.

In these proceedings, the school board sought to modify the previous order by ordering the reopening of one school that had been ordered closed. The Negro school children who were the original plaintiffs in the action did not have any objection as long as the reopened school was not racially identifiable. The court agreed that the school could be reopened and established attendance zones for the school.

Parker v. Tangipahoa Parish School Board
299 F. Supp. 421
United States District Court, E. D. Louisiana, New Orleans Division, April 8, 1969.

White school children and their parents sought to convene a three-judge district court to hear their allegation that the Jefferson decision and the guidelines of the U.S. Department of Health, Education, and Welfare are unconstitutional. They alleged that the Jefferson decision "is in effect a statute, which is violative of the basic concepts of the Constitution of the United States." They also alleged the unconstitutionality of any administrative orders of HEW relating to the forced bussing or forced school attendance other than on the basis set forth in the Civil Rights Act and the Constitution.

The district court said that a "three-judge court is convened only in cases raising a substantial constitutional question of the validity of a statute or regulation." The court considered the first ground raised by the parents to be completely frivolous. The Jefferson decision was "neither a statute nor a regulation; thus no three-judge court is necessary to consider its "unconstitutionality."

The second contention was considered equally insubstantial. The HEW guidelines were not in force in Tangipahoa Parish because the school district was subject to a court order and the plaintiffs were in no way affected by these guidelines. Therefore, plaintiffs had no standing to challenge their constitutionality. In any event, the court felt that even if they had standing, there was an insubstantial constitutional question because the guidelines had been previously upheld by the U.S. Court of Appeals for the Fifth Circuit.

Having found both contentions unsound and frivolous, the court denied plaintiffs' request to convene a three-judge court.

Plaquemines Parish School Board v. United States
415 F. 2d 817
United States Court of Appeals, Fifth Circuit, August 15, 1969.

The Commission Council and the school board of Plaquemines Parish appealed from a decision of the district court that entered a detailed decree for the desegregation of the parish school system, enjoined the Council from transferring any property of the public schools for the use of private schools, and ordered the Council and the board not to discourage pupils from public-school attendance or to encourage private-school attendance. The board and the Council appealed both on procedures adopted by the district court and on the merits of the case.

As a procedure the defendants complained that the action should have been dismissed because of the failure of the Government to establish its right to file suit and to produce the names of the complainants. The appellate court noted that section 407 of the 1964 Civil Rights Act provides that when the Attorney General is satisfied that he has received meritorious complaints from the parents of children in a school system to the effect that the children are being denied the opportunity for an equal education and when he is further satisfied that the parents are unable to bring suit themselves, he may issue a certificate verifying the existence of the complaints. The law also makes clear that the parents are entitled to anonymity. The court ruled that the school board knew the nature of the suit without necessarily being presented with the exact complaints.

The argument of the Council that it was entitled to a trial by jury because the action of the Government was in the nature of a suit to try title to land was found by the appellate court to be without merit. The motion of the Government to enjoin the Council from transferring title to school properties which was part of a school desegregation suit was insufficient to sustain this argument. The court held that there is no right to trial by jury in an injunctive action relevant to school desegregation. The Council also argued that because it had completed negotiations for lease of school property to the school board, the motion for a mandatory injunction should have been dismissed for mootness. The court disagreed, saying that injunctive relief was still necessary to halt the Council from again inducing the school board to transfer school properties back to it.

The appellate court found no merit in the contentions of the Council that the district court judge should have removed himself from the case since its evidence was insufficent to show the quality of prejudice necessary before such a request is granted. The final argument involved the trial court's alleged use of

HEW guidelines in fashioning its decree. The appellate court found no showing that the trial court relied on the HEW guidelines and said that whatever sub silentio use may have been made was justified under the Jefferson decision.

After extensive findings of fact and conclusions of law, the district court ordered the school board to desegregate by utilizing a Jefferson type freedom-of-choice plan. Rather than questioning the propriety of the decree, the Commission Council and the board questioned the findings of fact and conclusions of law. Their one central complaint was that the court and the Justice Department had usurped their authority to operate the school system.

The district court had found a general pattern of neglect of the public schools of the parish and an encouragement of the private school system for white pupils. Prior to integration the Commission Council transferred funds to the school board for general operation and construction. For the 1966-67 school year there were no transfers of money. The school board also lost substantial funds because of a decrease in enrollment brought about by the establishment of the white schools. The board and the Council also refused to apply for any of the available federal funds for special programs. The district court also found that materials and equipment had been removed from the public schools for use in the private schools. Textbooks had been taken to the private schools although there was a shortage in the public schools. Children at one of the integrated schools were denied use of their gymnasium and auditorium although these facilities were used by the private school in the area.

The fact findings also showed that the teacher corps in the public schools had been depleted and demoralized by the actions of the Council and the board. Contracts for white teachers had not been sent out at the customary time, causing confusion and uncertainty among the white teachers. White teachers were also recruited for the private schools during public-school hours, and the private-school teachers were paid at a higher rate than the teachers in the public schools.

The Council and the board in their efforts to build up the private schools, also took action to disrupt the operation of the public school system in a number of ways. The transportation system was operated primarily for the use of private-school pupils. Routes and schedules were changed so that many children had to rise earlier and walk farther than ever before. The opening times of the public schools were changed to an earlier hour with no reason cited. In view of this evidence, the appellate court felt that it was a valid assumption that the change was brought about for the purpose of disrupting the routine of the public schools.

According to the appellate court, the evidence also supported the findings of the district court that the board and the Council had failed to maintain and improve the grounds of the public schools. Further, the findings indicated inequities between the formerly all-white and the Negro schools in the curriculum and other areas. After this suit was instituted, the board, rather than operate all facilities equally at all schools, dropped the supplemental programs from the white schools. The school lunch program was changed greatly by a price increase in the 1966-67 school year. Financial distress was given as the reason, but the court did not find this convincing when the parish neglected all forms of federal aid for its lunch program. The district court findings further indicated that bookmobile service was no longer provided to the public schools but was provided to the private schools. The appellate court ruled that all of the findings of the district court were amply supported by the testimony and exhibits in the record.

The appellate court noted that the board did not object to the freedom-of-choice decree entered by the district court or to the provision relating to the location and expansion of schools to eradicate the vestiges of the dual system, or to the requirement that fringe benefits be offered to teachers on a nondiscriminatory basis. Rather, the Commission Council and the board objected to the additional affirmative steps required by the district court to preserve the public school system of the parish and to operate it on a nondiscriminatory basis; and from the prohibitory aspects of the decree which enjoined them from further action which tended to disrupt the public school system or tended to aid the establishment of a private school system. The appellate court found that the lower court decree was justified by the findings of fact, the testimony, and prior decisions.

With one exception, the specific requirements of the district court were held valid, justified, and within its discretion. The district court had ordered remedial programs to be instituted for Negro pupils transferring to formerly white schools. Meaningful school equalization had been directed by the addition of programs at the Negro schools rather than the deletion of those programs at white schools. Maintenance and repair work had been ordered as well as the construction of athletic fields. The district court took action to remedy the chaotic conditions of the transportation system by ordering the board and the Council to operate a transportation system for the benefit of the public schools not the private schools. Also ordered was the return to the former lunch program, the bookmobile service, the original starting times of classes, and the reinstatement of abandoned extracurricular activities. All of these orders were upheld by the appellate court.

In addition, the district court had ordered the school board to finance the operation of the school system so as to comply with the decree. This could be done only if monies were made available from the Commission Council. Contrary to the contentions of the defendants, the appellate court ruled that the lower court had the power to issue the order, but the provision that directed the school board to apply for financial aid for federal programs was deleted by the appellate court on the ground that this provision was too broadly written. The right of the district court to act in a specific situation was reserved to that court, however.

The Commission Council objected to the portion of the decree that enjoined its encouragement of private schools and its attempts at debilitating the public school system. It was specifically enjoined from selling, transferring, or otherwise disposing of any of the real or personal property of the school board to be used for educational purposes by any other school system or in any other way interfering with the desegregation order. The appellate court ruled that the findings of fact of the lower court warranted this relief.

Also rejected by the appellate court was the objection of the Commission Council to the limitations placed on it in relation to encouraging any pupils to attend private school. The court noted that the acts forbidden applied to the individual members of the board and Commission Council in their official capacity only, and, therefore, did not violate the members' First Amendment rights to free speech. The board and Council were reminded of their affirmative duty to eradicate the last vestiges of the dual school system.

With the one modification already mentioned, the decree of the district court was affirmed, and the case remanded to that court for continued jurisdiction.

Poindexter v. Louisiana Financial Assistance Commission
296 F. Supp. 686
United States District Court, E. D. Louisiana, New Orleans Division, March 19, 1968.

(See Pupil's Day in Court: Review of 1966 p. 20, Review of 1968 p. 37.)

The most recent appearance of this case involved another attempt by the Louisiana legislature to provide grants-in-aid to pupils attending private schools. Previous attempts had been struck down by the courts. The current legislation, referred to as Act 99 of 1967, replaced Act 147 of 1962, which in turn had replaced two previous attempts.

Act 99 arose as stand-by legislation to be put into effect if and when the earlier statute was declared unconstitutional. It created the Louisiana Education Commission for Needy Children and authorized that Commission to disburse tuition grants to "private non-sectarian elementary or secondary school(s)" for children attending such schools within the state. The primary differences between Act 147 of 1962 and the present legislation are the statutory language of purpose and the coordination between financial need and the amount of assistance in the latter. The court considered these distinctions superficial. It noted that the act was openly acknowledged as stand-by legislation, that the program under it had the same administrative personnel, office space, and almost the same budget as its predecessor, and approximately the same number of pupils applied for grants to attend the same schools.

The court observed that while the language of Act 99 was more sophisticated, "the purpose of Act 99 of 1967, like the purpose of its predecessors, is to give state aid to private discrimination. With each new scheme of tuition grants the State nourished segregated schools which could not have come into existence or have continued without the nourishment provided under the earlier discriminatory schemes." The court ruled that Act 99 must go the way of its predecessors. Its "unlawful end and necessary effect" was to establish and maintain segregated schools for white children in violation of the equal protection clause.

Accordingly, the Commission was enjoined from enforcing the provisions of the Act.

Smith v. St. Tammany Parish School Board
302 F. Supp. 106
United States District Court, E. D. Louisiana, New Orleans Division, July 2, 1969.

In a previous action the court had ordered the board to modify its desegregation plan for the 1969-70 school year and specifically ordered the elimination of the all-Negro schools operated by the board.

The amended plan, now before the court for approval, eliminated the all-black and predominantly black schools. Only a few schools would be all-white, but this, the court found, resulted from residential patterns not racial discrimination. Under the new plan the school board proposed to segregate some of the schools on the basis of sex. The board contended that this would be a transistory measure designed to ease the conversion to a unitary school system. The court approved the proposal for the 1969-70 school year.

The Negro school children who had brought the suit objected to the proposed closing of an all-Negro school which was an adequate facility. The assignment of its pupils to the previously all-white school would result in severe overcrowding

at the latter school. The court could find no valid educational reason for abandoning the Negro school and consequently required the school board to keep it open and to assign pupils to that school on a nondiscriminatory geographic zoning basis.

The plan proposed the desegregation of some of the white schools by the assignment of Negroes to them on the basis of geographic proximity. The Negro pupils objected to this method of assignment because white children attended those schools through freedom of choice. The court said that because Negro children could have attended these schools but did not choose to attend them, it was up to the board to assign them there to achieve a unitary system.

With regard to faculty desegregation, the board proposed to integrate the faculties so that the ratio of white to Negro teachers in each school approximated the ratio of white to Negro pupils in that school. While the court permitted this for the 1969-70 school year, for subsequent years the board was required to make teacher assignments so that the ratio of white to Negro teachers in each school approximated the ratio of white and Negro teachers in the system.

An order was entered approving the plan with the modifications outlined.

Michigan

Jipping v. Manning
166 N.W. 2d 472
Court of Appeals of Michigan, Division 2, December 31, 1968.

This case challenged the action of the board of education of the Lansing School District. The board had transferred pupils from one school to another to achieve a better racial balance in the junior and senior high schools of the district. The action of the Lansing board was challenged on the ground that the decision was made solely on the basis of race.

The lower court entered judgment for the plaintiffs. On appeal the decision was reversed.

It was clear to the appellate court that the board had the right to change geographic boundaries of the schools and to consider racial factors along with other educational considerations in making such changes. The court held that since the motive and the ultimate good-faith objective of the board was to achieve racial balance and an equal educational opportunity for all pupils, the case was controlled by Mason v. Flint Board of Education (149 N.W. 2d 239, 1967) which held that boundary changes to achieve equal educational opportunity were permissible.

Mississippi

Adams v. Mathews
403 F. 2d 181
United States Court of Appeals, Fifth Circuit, August 20, 1968.

(See page 29.)

Alexander v. Holmes City Board of Education
90 S.Ct. 29
Supreme Court of the United States, October 29, 1969.

The U.S. Court of Appeals for the Fifth Circuit on August 28, 1969, had granted the many Mississippi school districts more time in which to implement desegregation plans. This decision was appealed to the Supreme Court of the United States. The Supreme Court ruled per curiam that the Court of Appeals should have denied all of the motions of the school districts for more time because "continued operation of segregated schools under a standard of allowing 'all deliberate speed' for desegregation is no longer constitutionally permissible." The Supreme Court held that under its explicit prior holdings "the obligation of every school district is to terminate dual school systems at once and to operate now and hereafter only unitary schools."

The Supreme Court ordered the lower court order vacated and the cases remanded to that court for the issuance of a decree effective immediately declaring that each of the school districts may no longer operate a dual system based on race or color and that each immediately begin operation of a unitary system. The Court of Appeals was permitted to use discretion in directing the districts to accept all or any part of the recommendations of the U.S. Department of Health, Education, and Welfare, with any modifications deemed necessary to insure a unitary system for all pupils without regard to race. The Court of Appeals could make its determination and enter its order without further arguments or submissions.

The Supreme Court order provided also that while each of the school systems is being operated as a unitary system, the district courts could consider objections and amendments to the Court of Appeals order, but no objections or proposed amendments could be heard until that order had been complied with in all respects. The Court of Appeals was additionally directed to retain jurisdiction to insure prompt and faithful compliance with its order. The Supreme Court also requested the Court of Appeals to give priority to the execution of this judgment as far as possible and necessary.

Anthony v. Marshall County Board of Education
409 F. 2d 1287
United States Court of Appeals, Fifth Circuit, April 15, 1969.

Negro pupils sought to desegregate two public school systems in Mississippi either through pairing of existing school facilities, or geographic zoning. The district court concluded that the only workable method was to permit the systems to continue under their freedom-of-choice plans. Both districts had Negro majorities and the lower court felt that white children

would flee the systems if pairing or zoning plans were introduced. The Negro pupils appealed this decision.

Subsequent to the filing of the complaint, the Supreme Court of the United States decided the Green case which held that freedom-of-choice plans which did not result in integrated school systems were no longer acceptable.

As to the districts in question, the appellate court found that one district had 3.2 percent of the Negro pupils attending schools with white children while in the other district the percentage was 1.7. Applying the criteria in Green, the court held that freedom-of-choice plans operated by the boards could no longer be considered suitable methods of effectuating a transition to a unitary nondiscriminatory school system.

The judgment of the district court was reversed, and the case was remanded for further proceedings consistent with the opinion.

Coffey v. State Educational Finance Commission
296 F. Supp. 1389
United States District Court, S.D. Mississippi, Jackson Division, January 29, 1969.

Negro pupils and their parents challenged the constitutionality of a statute providing a state system of tuition grants to children attending private nonsectarian schools. The purpose of the statute, according to the preamble, was "to encourage the education of all of the children of Mississippi" and "to afford each individual freedom in choosing public or private schooling." At the time of its enactment in 1964, there were three schools in Mississippi whose pupils subsequently obtained state grants. By the 1967-68 school year the number of such schools had risen to 49. Of these all but one were all-white.

The evidence before the court indicated that the state tuition grants were critical to most of the schools. The formation and operation of the new private schools were on the thinnest financial basis, and the tuition charges were scheduled to coincide with the quarterly payment of the state grants.

The court concluded that the state tuition grants "fostered the creation of private segregated schools." The statute encouraged, facilitated, and supported a system of private schools operated on a racially segregated basis as an alternative to white pupils seeking to avoid desegregated public schools. The court found that the grants tended to perpetuate segregation in violation of the equal protection clause of the Fourteenth Amendment. The court said that the Constitution permits parents to send their children to private, segregated schools if they wish, but the Constitution does not permit the state to involve itself in this private discrimination.

The court issued an order enjoining the payment of the state tuition grants, but permitted continued payment for the remainder of the current school year.

Henry v. Clarksdale Municipal Separate School District
409 F. 2d 682
United States Court of Appeals, Fifth Circuit, March 6, 1969.

Certiorari denied, 90 S.Ct. 375, November 24, 1969.

Negro pupils appealed the school desegregation decision of the district court. The lower court found that the school board had acted in good faith in drawing geographic attendance zones to achieve desegregation. The city of Clarksdale is bisected by the main line of a railroad. The board had drawn attendance zones so that no child would have to cross the tracks to attend school, but because of the housing patterns of the city this plan achieved only token integration.

The pupils attempted to prove that the motive behind the zone lines was to perpetuate a dual, segregated school system. The board justified its decision on several grounds, including natural boundaries and the welfare of pupils.

The appellate court said that there was one additional criterion that the board should have used: promotion of desegregation. It cited its own decisions and those of the Supreme Court as requiring that the board take affirmative action to dismantle the dual system and achieve a unitary, nonracial school system. The court noted that a school board's zoning may appear to be neutral but in fact might tend to retard desegregation because it binds pupils to custom-segregated neighborhoods. In the instant case, the court felt that the failure of the Clarksdale board to take corrective action amounted to the state's giving official sanction to continued school segregation.

At the time of the trial the city still had segregated schools. However, the appellate court noted that a long time had elapsed since the trial, and in view of the delay the case would be remanded to the district court to determine the effectiveness of the Clarksdale plan in its present factual setting. "The Board should bear in mind that it bears the burden of proving that its existing plan of desegregation is adequate now" to convert to a nonracial unitary school system.

The court ruled that if it was found that there were still all-Negro schools, or only a small fraction of Negroes enrolled in white schools, or no substantial integration of faculties or activities, as a matter of law the existing plan failed to meet constitutional

standards. The board was told to consider redrawing its attendance-zone boundaries, incorporating a majority-to-minority transfer provision, closing all-Negro schools, consolidating and pairing schools, rotating principals, and taking other steps to overcome defects of the present system.

The case was remanded to the district court for further action consistent with the opinion.

United States v. Greenwood Municipal Separate School District
406 F. 2d 1086
United States Court of Appeals, Fifth Circuit, February 4, 1969; rehearing denied March 5, 1969.

The district court approved a desegregation plan for the Greenwood school district, and both the school district and the United States Government appealed.

Before considering the merits of the plan, the appellate court ruled on procedural motions of the school district. The first involved the right of the Government to file suit because of its refusal to produce any evidence to establish this right. The 1964 Civil Rights Act provides that the Attorney General may file suit when he has received meritorious complaints from the parents of school children in the system that they are being deprived of equal protection of the law, and he has determined that the parents are unable to initiate legal action themselves. Having received the complaints, he issues a certificate verifying them. The court held that having issued the certificate in conformity with the statute, the Attorney General acquires standing to sue. Further, the Attorney General cannot be required to reveal the names of the complainants or the nature of the complaints, and neither the school board nor the courts have any right to examine the information upon which the certificate was issued.

The next contention of the board was that the Government cannot challenge the adequacy of a freedom-of-choice plan when the model decree was entered on its own motion. The appellate court held that recent decisions foreclose the use of freedom of choice in Greenwood because it has produced little meaningful integration. On remand, the school board would have the right to a hearing as to the attendance plan it considers most desirable.

The facts before the court showed that the school district operated nine schools. Eight were attended on the basis of freedom of choice; the ninth was attended strictly on the basis of a geographic attendance zone. This desegregation plan had produced no integration in the school with the attendance zone and in the freedom-of-choice schools 0.6 percent of the Negro school population received an integrated education in the 1967-68 school year. The court found that freedom of choice had not been successful in converting the system to a unitary, nonracial one. With regard to the one school that had an attendance zone, the court agreed that the zone was drawn on a rational basis but said that it would have to be re-evaluated. A geographic zoning plan like any other attendance plan adopted by the school board, the court stated, is acceptable only if it tends to disestablish rather than reinforce the segregated dual school system. Initial determination of the best plan was left to the district court.

The court also found that faculty desegregation was almost nil. The school board was reminded that it bore the burden for integrating the faculty of each school. Each faculty must be balanced so that it is not identifiable as being tailored for a black school or a white school. This goal must be reached by the 1970-71 school year.

The judgment of the district court was reversed, and the case was remanded for further proceedings consistent with the opinion.

United States v. Hinds County School Board
402 F. 2d 926
United States Court of Appeals, Fifth Circuit, August 14, 1968.

Certiorari denied, 90 S.Ct. 612, January 14, 1970.

The United States sought an appellate court review of a desegregation plan approved by the district court for Hinds County. The plan differed from the Jefferson decree in three respects. The Jefferson decree was meant to apply as far as possible uniformly throughout the Fifth Circuit. Exceptional circumstances were required to justify modification of the model.

The first two changes involved the choice forms. The lower court order provided that a choice be executed on an official form only and that forms be available only to pupils and their parents or third persons bearing written authorization from the parents. The model decree made forms freely available and provided that a choice could be exercised on other than an official form. The appellate court felt that the changes were substantial and not justified by any evidence.

The third change involved the reporting required in June of each year, indicating by race, the number of requests for transfer received and the number granted and the number denied, with reasons. The school board maintained that it did not have its pupils classified by race and, therefore, could not report by race. The district court's solution of the problem was to have the race of the pupils indicated in the report submitted after the school year began. This departure from Jefferson for reporting by

June 1 by race was approved by the appellate court with one exception. The school district was allowed to ask the race of the children new to the school system only on the choice form with the notation that this information was for the purpose of reporting progress toward desegregation.

The case was remanded to the district court for action consistent with this opinion.

United States v. Indianola Municipal Separate School District
410 F. 2d 626
United States Court of Appeals, Fifth Circuit, April 11, 1969.

Review denied, 90 S.Ct. 571, January 12, 1970.

The district court approved a desegregation plan for the Indianola schools, and both the school board and the United States Government appealed. Indianola operated with a two geographic zone plan for the pupils in the city limits and a free-choice plan for those outside the city limits. The zones reflected residential patterns that were completely segregated by race. This combined with the fact that pupils in the free-choice area chose to attend schools in which their race predominated resulted in not one child receiving an integrated education for the 1968-69 school year.

The appellate court stated at the outset that the plan was constitutionally defective and offered virtually no prospect of ever working. The board advanced such reasons as the safety of the children, the proximity of their residences to the schools, and maximum utilization of existing faculities as their reasons for adopting the plan. The court found that while these explanations were relevant considerations for any plan the school board might hereafter adopt, none of these factors, alone or combined, were of the overriding importance of the one factor the board did not consider--effective promotion of desegregation. The plan clearly did not meet the criteria of the Green decision and as such was unacceptable. The court did not tell the school board what plan it must adopt, but stressed its affirmative duty to abolish segregation.

Both the United States Government and the school board were dissatisfied with the provisions in the lower court's order for faculty integration. The school board asked nothing less than to be excused from complying with the Jefferson decree. The appellate court quickly disposed of this complaint. The Government objected to that portion of the lower court decision which authorized rather than mandated the school board to withhold approval of teachers' contracts unless such contracts would help achieve faculty desegregation. The court agreed with the contention of the Government and made the withholding of contracts mandatory unless such contracts would aid more racially balanced faculties. The board was further ordered to transfer teachers if voluntary efforts did not achieve integration.

The judgment of the district court was reversed, and the case was remanded with directions to the district court to require the school board to formulate a plan within the guidelines set out in the opinion.

The Supreme Court declined to review the case.

New York

Radford v. Gage
301 N.Y.S. 2d 282
Supreme Court of New York, Ontario County, June 5, 1969.

Parents of school children in Geneva, New York, sued to restrain the school board from executing and implementing a plan designed to alleviate racial imbalance in the schools. The parents also sought to enjoin the board from using the Prospect Avenue Elementary School on the ground that it was unsafe.

The school board had paired two elementary schools which were one-half mile apart in order to comply with the racial balance directives of the Commissioner of Education, and the policy statements of the State Board of Regents. The Prospect Avenue School previously had a 57 percent nonwhite enrollment. In addition, the pupils in that school had scored below other district schools on achievement tests.

The parents claimed that the plan was involuntary and that since it was limited to only two schools in the district, it was discriminatory and unconstitutional. They argued that they were denied equal protection of the laws because one-half of the residents would be required to send elementary-school children to a school that they would not ordinarily attend, while the remaining half of the district residents were exempt from the plan.

The court said that plans of this type are constitutional and valid. The criteria adopted by the school board for changing the boundary lines of attendance districts, among them, racial imbalance, low achievements in the Prospect Avenue school, and the improvement in the cultural equality of education for all children, negated any finding that the action of the board was in any way arbitrary, capricious, or unreasonable. The fact that some children will not go to the school nearest their homes, the court stated, in no way makes the plan illegal or arbitrary.

The court also ruled that there was nothing in the record to reflect any safety hazard at the Prospect Avenue School.

The action of the board of education was upheld, and the complaint of the parents was dismissed.

North Carolina

Boomer v. Beaufort County Board of Education
294 F. Supp. 179
United States District Court, E.D. North Carolina, Washington Division, August 5, 1968.

Negro school children applied to the court for further relief from school segregation in Beaufort County. The court ruled that the school board was operating a racially dual public school system. It ruled further that freedom of choice was an unconstitutional and impermissible means for the desegregation of the Beaufort County schools because this method had been tried in the past and had not resulted in the elimination of the dual system.

The court ordered pairing of schools on an attendance zone basis for the 1968-69 school year. The board was further ordered to assign all faculty on a nonracial basis. High-school students were given the right to transfer to another school in the system for the 1968-69 school year only. Transportation and facilities were ordered desegregated. The board was required to file a report on the racial composition of the schools and to list the steps it proposed for the complete desegretation of the system.

Coppedge v. Franklin County Board of Education
293 F. Supp. 356
United States District Court, E.D. North Carolina, Raleigh Division, August 22, 1968.

(See Pupil's Day in Court: Review of 1967, p. 32, Review of 1968, p. 39.)

The school board applied for a stay pending appeal of the court's previous orders requiring conversion to a unitary school system for the 1968-69 school year. The board claimed that various administrative difficulties made it impossible for the board to comply with the court order. It asked instead for approval of a plan which would delay total integration until the 1970-71 school year.

The district's freedon-of-choice plan had been disapproved by the court in August 1967. At that time the school district had been ordered to utilize some other method of desegregation at the earliest practicable date. An appeal to the circuit court of appeals followed, and on April 8, 1968, the decision was upheld and the school district was criticized for its lack of progress. Other court appearances followed, at which plans of the district for desegregation were disapproved. The actions culminated on August 5, 1968, when the court ordered the school district to desegregate the schools by adopting a zoning plan with various schools within the zone converted into grade centers so that no two schools within the same zone offered the same grades. In the present proceedings the school district sought a stay from this order because of the alleged administrative difficulties.

The court found that "the alleged administrative difficulties on which defendants now rely in order to postpone desegregation in Franklin County are entirely the result of defendants failure to prepare for conversion." Further, even if the alleged difficulties had been presented to the court in timely fashion and even if they were not the result of the district's own conduct, they were manifestly insufficient to warrant further delays in the enjoyment of their constitutional rights by the Negro citizens of Franklin County.

The court entered an order which denied the application for stay of the previous orders of the court. The board was also ordered to open the schools in Franklin County as promptly as possible in compliance with court orders.

Felder v. Harnett County Board of Education
409 F. 2d 1070
United States Court of Appeals, Fourth Circuit, April 22, 1969.

The board of education appealed from a lower court decision which required more specificity in its plan for desegregation of the Harnett County schools. In an earlier hearing the district court had concluded that the county operated an unconstitutionally segregated school system and had ordered the school board to submit a desegregation plan. On August 5, 1968, the school board submitted its plan for three of the high schools but none of the elementary schools. The court ordered another plan which the school board submitted on August 19, 1968. The district court found that plan inadequate, but ordered that it be implemented for the 1968-69 school year and that a new plan be submitted for the 1969-70 school year. It is from that decision that the school board appealed.

The board contended that the district court incorrectly decided that the freedom-of-choice plan was inadequate to effect a transition to a nondiscriminatory school system. The facts indicated that in three years of its operation the plan had achieved only minimal desegregation. These facts, the appellate court held, justified the district court's holding.

The board additionally contended that it was improper for the lower court to require that any plan submitted utilize geographic attendance zones or consolidation or pairing of schools and in any event the previous plans submitted should have been accepted. The appellate court held that the lower court had both the power and

the duty to render a decree which would as far as possible eliminate the discriminatory effects of the past as well as prevent their recurrence. The decision of the lower court was affirmed.

Godwin v. Johnston County Board of Education
301 F. Supp. 1339
United States District Court, E.D. North Carolina, Raleigh Division, July 8, 1969.

Negro parents and school children in Johnston County brought suit for injunctive relief against the operation of a racially discriminatory school system. Named as defendants were the county board of education, the state board, and the state superintendent of education. The state board and the superintendent moved to have the action against them dismissed. The question raised by the motion was whether state officials in addition to local officials have an affirmative obligation under the Fourteenth Amendment to take action to remove all remaining vestiges of the dual school system in Johnston County.

In refusing to dismiss the action as to the state school officials, the court noted that the North Carolina Constitution provided that the general supervision and administration of the public school system was vested in the state board and that the state superintendent was a member of the executive department of the state. Moreover, school segregation in North Carolina was originally state-imposed, and since the Brown decision, state officials are charged with the affirmative duty to disestablish dual school systems. The court disagreed with the contention of the state school officials that the duty was "affirmative" only as it applied to local school boards and passive as it related to other agencies of the state. The court reiterated previous school desegregation cases where state officials had been charged with the duty to desegregate school systems.

The court also noted that North Carolina's reaction to the Brown decision had not always been neutral, and referred to the attempts that had been made by the state to circumvent its mandate. The court concluded that whether the state board or state superintendent had actively discriminated did not affect their burden to actively seek the desegregation of the public schools of North Carolina.

Swann v. Charlotte-Mecklenburg Board of Education
300 F. Supp. 1358
United States District Court, W.D. North Carolina, Charlotte Division, April 23, 1969; 300 F. Supp., 1318, July 20, 1969.

Certiorari granted, 38 U.S. Law Week, June 23, 1970.

(See Pupil's Day in Court: Review of 1965, p. 39; Review of 1967, p. 34.)

April 23 Decision

In these proceedings Negro parents and school children requested greater speed in the desegregation of the Charlotte-Mecklenburg schools. The school district was operating under a 1965 court order and had made some progress in desegregating the schools. The court noted that the law had changed since 1965 and recent Supreme Court pronouncements clearly charged the school board with the affirmative duty to desegregate now.

The court reviewed the history of school desegregation decisions as they applied to the Charlotte-Mecklenburg school system. In looking at the situation the court found that the school district consisted of a county-wide district with almost complete desegregation in the rural portion of the district. The city of Charlotte sits in the middle of Mecklenburg county and is bisected by Tyron Street, which parallels the tracks of the Southern Railway, and Trade Street. Business and industry follow the highways and the railway. The bulk of the Negro population lives west of the railway and north of Trade Street. The high-priced, almost exclusively white areas are east of the tracks and south of Trade Street. This results in a high degree of housing segregation. In 1965, when a zone plan with a free transfer provision was instituted, schools became temporarily desegregated but rapidly resegregated when the pupils transferred to the schools of their choice. A few of the city schools are integrated; however, most are in an unstable condition and are rapidly moving from an all-white to an all-black condition. The majority of the pupils in Charlotte attend schools predominantly black or white.

The school board followed the neighborhood school theory in locating schools and attempted to place elementary schools within walking distance of the children who attended them. However, 23,000 children ride school busses daily. The housing situation and the neighborhood school theory have resulted in the high degree of segregation in the schools. The court noted that when racial segregation was required by law, nobody evoked the neighborhood school theory to permit Negro children to attend white schools close to where they lived. "The neighborhood school theory has no standing to override the Constitution."

The court then issued an order encompassing the findings of fact and conclusions of law. The board of education was directed to submit a plan for the active and complete faculty desegregation. The board was expected to see that no teacher who may be displaced by the desegregation order be discriminated against on account of race. The board was further ordered to submit a plan and time-table for the active desegregation of the pupils to be predominantly effective in the fall of 1969, and to be completed by September 1970. Freedom of choice and zoning could be utilized only if they promoted rather than defeated desegregation. The board was directed to use such transportation

as was necessary to desegregate the schools and overcome the racially identifiable neighborhoods. The board was also encouraged to use the aid that was available from state and federal agencies. The court said the plan should be one for the effective operation of the schools in a desegregated atmosphere removed to the greatest extent possible from entanglement with emotions, neighborhood problems, real estate values, and pride.

June 20 Decision

Involved in these proceedings were various motions by the Negro pupil-plaintiffs and by the school board in the Charlotte-Mecklenburg desegregation case. The district court had previously ordered the school board to submit a plan for a nonracial, unitary school system.

The individual members of the school board moved the court to dismiss the action as to them. The court denied the motion, stating that the suit was brought under the 1964 Civil Rights Act and, therefore, individual members of the board were proper parties and their presence was appropriate and desirable.

The court next considered the motion of the Negro pupils that the members of the board be found in contempt of court. The court denied this motion, noting that the members of the board were badly divided among themselves and that their actions represented disagreement with, rather than contempt of the court's decree.

The court also held a hearing considering the proposed desegregation plan submitted by the board as directed by its order of April 23, 1969. In its latest order, the court deferred decision on the new plan for faculty desegregation pending receipt of a progress report from the board. The plan of the board was to rely on voluntary transfers rather than the assignment of teachers. The court approved a provision for the transportation of pupils transferring from a majority situation to a minority one. The one-year penalty imposed on high-school athletes who transferred schools was disapproved, and the board was instructed to communicate this fact to students. Further, the board of education was directed to prepare and submit a positive plan for desegregation by August 4, 1969.

NOTE: Prior to the time this publication went to press, three more decisions were handed down in the Charlotte-Mecklenburg desegregation case. In the first, the district court approved for on year the plan of the board of education for the closing of seven all-black schools and the program for faculty integration (306 F. Supp. 1291). The second, again by the district court, denied the motion of the school board for a further extension of time to complete desegregation. Based on the Supreme Court decision in Alexander v. Holmes County (90 S. Ct. 29, see page 36 of this report), the district court held that the decision preempted the normal discretion of the court to grant an extension.

The third decision was rendered by the U.S. Court of Appeals for the Fourth Circuit. It involved an appeal from the order of the district court relative to the plan. The appellate court held that not every school in a district need be integrated and the fact that all-black schools would remain should not void an otherwise exemplary plan for the creation of a unitary school district. The plan ordered by the district court was upheld by the appellate court except to the extent that it required bussing of elementary-school children. The provision of the plan which required bussing of junior and senior high-school students was left intact. The Supreme Court of the United States has granted a review of the case (38 U.S. Law Week 3522, June 23, 1970).

United States v. Bertie County Board of Education
293 F. Supp. 1276
United States District Court, E.D. North Carolina, Washington Division, August 5, 1968.

Suit was brought by the United States alleging the operation of a segregated school system in Bertie County. The court made findings of fact that substantiated the charges. It found that there had been minimal progress in the desegregation of the schools, that the faculty and the staff were still almost totally segregated, and that the transportation system and the athletic program were also operated as a dual system. The court ruled that the freedom-of-choice plan operated by the district would only be an acceptable method of desegregation if it achieved substantial progress in disestablishing the dual system based on race. This has not happened in Bertie County, the court said.

The court entered an order that detailed what method of desegregation was to be used by the school district. The school board was ordered to consolidate the upper grades for the 1968-69 school year and to present a complete desegregation plan by January 1, 1969, to be effective for the 1969-70 school year. The new plan was to prescribe unitary, nonracial, geographic attendance zones, or consolidation of grades or schools, or some combination of the two, with pupil assignments not dependent on a choice exercised by or for the pupils. Additional orders were entered relating to the desegregation of the faculty and staff as well as the transportation system and faculties of the schools.

United States v. Jones County Board of Education
295 F. Supp. 640
United States District Court, E.D. North Carolina, New Bern Division, August 23, 1968.

Jones County was under a court order to desegregate its dual school system. The proposed desegregation plan was before the court for approval. For the 1968-69 school year, the school

board's plan provided for pairing elementary schools in close proximity. For the 1969-70 school year, the entire system was to be reorganized with pairing again utilized except for two elementary schools which were to be zoned.

The court approved the school-board plan and permanently enjoined the district from failing or refusing to implement the plan with the commencement of the 1968-69 school year. In addition, the court ordered the school district to desegregate the faculties and staffs of the schools and to assign each faculty and staff member, as far as practicable, to the school offering the grade that the teacher had previously taught. The decree contained provisions for any faculty member displaced as a result of desegregation. Reports on the number of faculty and pupils by race in each school were ordered to be filed with the court. Jurisdiction of the case was retained.

South Carolina

Brown v. South Carolina State Board of Education
296 F. Supp. 199
United States District Court, D. South Carolina, Columbia Division, May 31, 1968.

An action was brought to enjoin the implementation of a 1963 South Carolina statute which provided for the payment of scholarship grants to qualified South Carolina school children who desired to attend private schools in the state.

The three-judge court declared the statute unconstitutional. In so holding, the court said: "A review of the record, including the historical background of the Act, clearly reveals that the purpose, motive, and effect of the Act is to unconstitutionally circumvent the requirement first enunciated in Brown v. Board of Education...that the State of South Carolina not discriminate on the basis of race or color in its public educational system."

The state officials were, therefore, permanently enjoined from enforcing or seeking to enforce the provisions of the act.

Taylor v. Cohen
405 F. 2d 277
United States Court of Appeals, Fourth Circuit, December 5, 1968.

Parents of school children in the Richland County School District brought suit against the school board, the U.S. Department of Health, Education, and Welfare, and the U.S. Commissioner of Education. They alleged that the freedom-of-choice plan of the district was constitutional and that the federal officials wrongfully coerced the school board to adopt another plan by threatening to terminate federal funds. The lower court found that freedom of choice was the best educational plan for the district and that the HEW efforts to force the school board to abandon this plan were beyond the scope of their legal authority. The court entered an injunction restraining the school authorities and HEW from instituting or requiring any other plan but the freedom-of-choice plan for the 1968-69 school year. This decision was appealed by HEW.

The Civil Rights Act provides that no person shall, on grounds of race, color, or national origin, be excluded from or be denied the benefits of any program or activity receiving federal assistance. The Act authorizes termination of federal assistance if there is noncompliance with the law. However, before federal aid is terminated, there must be a determination that voluntary compliance cannot be secured, and an administrative hearing must be afforded which results in an express finding of failure to comply. Judicial review of final administrative action is also authorized by the law. In this case the action of HEW was not final. The agency had taken only intermediate steps to terminate federal assistance. Therefore, the court concluded that judicial review must await the outcome of the administrative hearing.

As an additional ground for maintaining this action, the parents also urged that the injunction they sought was not against HEW but rather against the officials who had exceeded their statutory authority by requiring the establishment of a unitary school system as a prerequisite to receiving federal funds. In rejecting this contention, the court pointed out that freedom-of-choice plans which perpetuate a dual school system are unconstitutional under recent U.S. Supreme Court decisions. Because the institution of termination proceedings by the HEW officials was based on a judgment that the school district plan did not eliminate the dual school system, the court said, the officials did not exceed their statutory authority. The court held that the suit against the HEW officials in reality was a suit against the United States and as such the suit could not be maintained because of the doctrine of sovereign immunity.

The federal officials urged that the parents did not have standing to bring the action. The court said that while the parents are interested in the school system attended by their children, they do not have standing to seek judicial interference with a school board's exercise of its discretionary power, but they can bring a suit to enjoin an unconstitutional action of the board. Here, however, there was no allegation that the plan urged for adoption by HEW was unconstitutional. The parents attacked the motivating force behind the change in the desegregation plan--the threatened cutoff of federal funds. The court ruled that this in essence was an indirect attack on the

discretionary power of the board which the parents did not have standing to pursue.

The order of the lower court was vacated, and the case was remanded to that court with direction that it be dismissed.

Whittenberg v. Greenville County School District
298 F. Supp. 784
United States District Court, D. South Carolina, March 31, 1969.

Review denied, 90 S.Ct. 1499, April 27, 1970.

Following the 1968 decision of the Supreme Court in Green v. County School Board (88 S.Ct. 1689), the South Carolina federal district court held a combined hearing in cases involving 22 school districts and entered an order that the school districts submit amendments, if any, as might be necessary to bring the districts' desegregation plans into conformity with the Green decision. All of the school districts submitted returns alleging generally that their current plans of operation met the criteria. The pupil-plaintiffs in all of the actions after reviewing the returns, entered their objections. They contended that the plans of the school districts did not comply with the constitutional standards of Green.

The court did not feel that it was appropriate to issue one decree for all of the school districts in view of the many diverse situations involved. Therefore, the court ordered all of the school districts to submit to the U.S. Office of Education, Department of Health, Education, and Welfare, their existing changes and attempt within 30 days to develop with the assistance of the experts of that Office an acceptable plan of operation. If the plan could be agreed upon by the district and HEW within the time limit, the court would approve the plan, unless the plaintiffs showed that the plan does not meet constitutional standards. Absent a showing of constitutional infirmity, the plan agreed upon would be adopted as a decree of the court. If no agreement was reached between HEW and the school district, the court would enter its decree after considering the proposals of all of the parties.

The Supreme Court declined to review the case.

Tennessee

Goss v. Board of Education, City of Knoxville, Tennessee
406 F. 2d 1183
United States Court of Appeals, Sixth Circuit, February 10, 1969.

(See Pupil's Day in Court: Review of 1967, p. 37; Review of 1963, p. 28; Review of 1962, p. 25, 26; Review of 1960. p. 22.)

Negro school children sought further relief in the desegregation of the Knoxville public schools. The district court denied the motion and the pupils appealed. Two questions were presented on appeal: whether the school system was completely desegregated in spite of the fact that there were some schools still identifiable as Negro schools; and whether the school system should have been ordered to pair schools, to locate new schools so as to eliminate identifiable Negro schools, and to take other affirmative action to disestablish the dual school system.

In answering the first question, the appellate court said that the presence of identifiable Negro schools does not of itself establish a denial of the rights of those children. The court also noted that only 15 percent of the school population in Knoxville is Negro; that certain transfer provisions, which plaintiffs charged increased segregation, were designed to and did in fact increase desegregation; and that Knoxville had a majority-to-minority transfer provision applicable only to Negro pupils which aided desegregation and was the only exception to the attendance zone plan.

In view of the fact that in the 1966-67 school year 82.6 percent of the Negro pupils were attending mixed schools, the appellate court found that substantial progress had been made in school desegregation. These figures, the court said, were indicative of the good faith of the board, and the effectiveness of the integration of its schools.

The district court judge had stricken the case from his docket, feeling that integration had been achieved. This had been done prior to that decision in the Green trilogy. In view of these decisions the appellate court believed that the case should remain on the docket. It was suggested to the Knoxville board that in the time ahead and consistent with its duty to serve its entire school population without discrimination, the board may wish to try pairing of schools and some alteration of its construction plans. But no orders were made in this regard.

The judgment of the district court, with the exception of the provision removing the case from the docket, was affirmed.

Kelley v. Metropolitan County Board of Education of Nashville and Davidson County, Tennessee
293 F. Supp. 485
United States District Court, M.D. Tennessee, Nashville Division, November 22, 1968.

Students at an all-Negro high school sought an injunctive order against the school board and the Tennessee Secondary School Athletic Association (TSSAA) enjoining the suspension of Cameron High School from interscholastic athletic competition for one year. Additional relief was sought directing the transfer of

some of the students to white high schools and directing the school board to file a desegregation plan. The suspension had been imposed separately by the school board and by TSSAA following investigations of alleged misconduct by Cameron students at a basketball tournament.

Notice had been served on the Cameron principal that the board's investigating committee would conduct a hearing into the alleged disturbances. The principal and other Cameron officials attended the hearing, but did not hear all of the testimony nor were they offered the opportunity to examine or cross-examine the witnesses. Following the hearing Cameron was suspended. Subsequent to the school-board action, TSSAA advised the Cameron principal that as a result of its own investigation, it concurred with the school-board action.

A plea for reconsideration was heard by the school board but the previous action was left intact. TSSAA likewise refused to reopen the case. The motion for further relief was then filed with the court.

The defendants questioned the standing of the students to bring the action. The court said that because the students of Cameron High School were substantially affected by the suspension, it would be hard pressed to conceive of more appropriate parties to complain of the suspension. The court held that the students did have standing to assert and maintain claims in the court.

The court then considered the question of whether TSSAA was subject to the constitutional limitations of the Fourteenth Amendment. TSSAA argued that it was not a state instrumentality and that membership was voluntary and, therefore, it was not subject to the due process requirements. The court disagreed with these contentions and held that the functions of the Association were so closely identified with state activities that it was subject to the constitutional limitations placed upon state action by the Fourteenth Amendment.

On the question of whether due process was afforded the high school in the hearing before the school board, the court was of the opinion that the rudiments of fair play had not been observed. In holding that the board had denied Cameron High School the protection of procedural due process, the court cited two separate considerations. "The first of these is the lack of pre-existing standards and regulations to structure any disciplinary action taken by the Board; and the second is the conspicuous absence of a formal charge, followed by a hearing, against any particular school or individual of misconduct." The court could find no considerations which would justify the board's failure to afford Cameron High School at least the rudiments of an adversary hearing--notice of a specific charge of misconduct, and a hearing on such charge before imposing admittedly drastic group disciplinary punishment. It is universally recognized that an athletic program is an integral part of a student's total educational experience, the court said, and a suspension of the school's athletic program adversely affects practically all the students in the suspended school to some degree and directly affects the school athletes who may be denied collegiate scholarships because they cannot play in their senior year in high school. The court did not feel that the notice given to the principal was adequate to inform him of the disciplinary punishment that would be imposed should the evidence disclose misconduct.

The court did not hold that group punitive action was impermissible, nor did it hold that each student must be given a hearing, as advocated by the plaintiffs.

With regard to the suspension by TSSAA, the court ruled that the high school was not denied due process by the group on grounds that its regulations were vague or lacked specificity. The regulations of the Association were sufficient to notify member schools that unsportsmanlike conduct or misbehavior at athletic contests could result in the entire school losing its athletic privileges. Nor was the school denied due process of law in failing to be accorded a hearing by the Association, for the facts showed that the principal was offered a hearing and both parties agreed it would serve no useful purpose in view of the school board's action in suspending the school. Although the court concluded that the Association did not infringe on the constitutional rights of the school, it was of the opinion that with the nullification of the board's suspension, the principal reason for foregoing an Association hearing had been removed, the school should not be held to the consequences of a waiver of the right to a hearing.

The court was unable to find any support for the students' allegation of racial discrimination. A ruling on the question of the transfer of students was reserved to the time when a full hearing could be held on the question.

The court enjoined the school board's suspension of Cameron High School from interscholastic athletic activities, but left the TSSAA suspension in full force and effect, pending a possible further hearing before the body.

Texas

Addams v. Mathews
403 F. 2d 181
United States Court of Appeals Fifth Circuit
August 20, 1968.

(See page 29.)

Virginia

Beckett v. School Board of the City of Norfolk
302 F. Supp. 18
United States District Court, E.D. Virginia, Norfolk Division, May 19, 1969.

(See Brewer v. School Board of the City of Norfolk, Pupil's Day in Court: Review of 1968, p. 42. Review of 1965, p. 41.)

Following the remand of the Brewer case, the school board, the National Association for the Advancement of Colored People, and the Civil Rights Division held conferences. No agreement was reached on a desegregation plan for the Norfolk public schools. The NAACP and the Civil Rights Division felt that the court should require more integration and that bussing was the solution. The school board had a long-range plan that it contended would integrate the schools and an interim plan that would continue freedom-of-choice for elementary and junior high schools and utilize zones for the senior high schools.

The court looked on bussing with disfavor. It felt that it was inconvenient and substantially destructive of the educational system and that the cost was an insurmountable objection. The court did not feel that the ultimate results of the board's long-range optimal plan were materially different from those of the Civil Rights Division plan.

On remand of the Brewer case, the district court had been directed to determine whether the racial pattern of the districts resulted from racial discrimination because of housing. Earlier the district court had found de facto segregation, but the court of appeals disagreed and found an inference of de jure segregation. After reconsideration, the district court still did not think that there was the requisite governmental involvement in the housing patterns to find de jure segregation.

The court approved the interim plan for the 1969-70 school year.

Griffin v. State Board of Education
296 F. Supp. 1178
United States District Court, E.D. Virginia, Richmond, February 11, 1969.

(See Pupil's Day in Court: Review of 1965, p. 56.)

Negro school children attacked the constitutionality of the Virginia tuition grant statutes which provided for grants to children to attend a private school or a public school outside the district in which they lived. The law had been upheld in 1965 as nondiscriminatory in that children of all colors were eligible for the grants and the state connection with the private schools was negligible.

In 1968, the Supreme Court of the United States reviewed and invalidated similar laws enacted by South Carolina and Louisiana. In the words of the district court, those decisions promulgated a more exacting test: "Whether the arrangement in any measure, no matter how slight, contributes to or permits continuance of segregated public school education." In the judgment of the district court, it followed from this test that neither the motive nor the purpose of the law in question was an indispensable element of the constitutional breach. The effect of the state's contribution to segregated education was a sufficient determinant with the effect ascertained entirely objectively. Against these criteria, the Virginia statutes could not stand. The state contributed the money to individual residents who could in turn use it for a segregated school. Thus, the payments were supporting an educational system decried by the Constitution.

The defendants argued that the issue was res judicata and could not be reopened. The court disagreed, holding that the intervening decision of the Supreme Court was sufficient reason under the Federal Rules for a reopening of the case.

The court declared the statutes to be invalid, but allowed the continuance of the tuition payments for the remainder of the school year so as not to work a hardship on the pupils enrolled in the private schools.

Walker v. County School Board of Brunswick County, Virginia
413 F. 2d 53
United States Court of Appeals, Fourth Circuit, July 11, 1969.

Two Virginia school boards appealed from orders of the district court which held that they were not entitled to utilize freedom-of-choice plans to integrate the public schools. Both systems have a majority of Negro school children and relatively little integration has occurred.

The appellate court pointed out that since Green v. County School Board of New Kent County (88 S.Ct. 1689) decided by the Supreme Court of the United States in 1968, freedom of choice is not acceptable as an adequate method of integration unless it "promises realistically to work, and promises realistically to work now."

On appeal the school boards did not contend that freedom of choice has worked, but rather that it was better to have some mixing in a freedom-of-choice system than to have an all-Negro system abandoned by white pupils. In upholding the judgment of the district court, the appellate court noted that the Supreme Court had rejected the same argument and refused to allow constitutional principles to yield because of disagreement with them.

PUPIL DISCIPLINE

Dress and Appearance

Alabama

Griffin v. Tatum
300 F. Supp. 60
United States District Court, M.D. Alabama, N.D., May 9, 1969.

A suspended high-school student sought readmission in good standing and injunctive relief against the principal, assistant principal, and other school officials to prevent their enforcement of a haircut regulation. The regulation specified the length of hair and sideburns. The student was suspended for violation of this regulation in that his hair was blocked in back rather than tapered as required by the regulation.

The school attempted to justify the regulation on the grounds that boys with long hair cause distraction by combing their hair in class and passing combs around the room. They also asserted that long hair caused boys to be late for class because they lingered over combing their hair, long hair was often dirty, boys with long hair were reluctant to engage in physical education activities, and long hair could cause a disruption because some students did not like long hair.

The evidence showed that the suspended student was above average academically, neat, and well groomed. With the principal exception of his hair style, he had caused no disciplinary problems in the school.

The court recognized that school authorities have the power and duty to establish and enforce student regulations which deal with activities which may interfere with requirements of appropriate discipline. However, the court held that the haircut rule constituted an arbitrary and unreasonable classification, and for this reason the suspension of a student for violation of the rule was contrary to the equal protection clause of the Fourteenth Amendment. The court also found that imposing this rule on the student "to the point of suspension infringes upon fundamental substantive liberties protected by the due process clause of the Fourteenth Amendment..." while there is disagreement over the proper analytical framework, the court said, there can be little doubt that the Constitution protects the freedom of an individual to determine his own hair style and otherwise to govern his own personal appearance.

The court was of the opinion that the reasons advanced by the school board as "justification" for the rule were invalid. If classroom decorum was a problem, the court felt, appropriate disciplinary measures could be taken without the requirement of a particular hair style. As to the fear that classroom disruptions would result because some students did not care for long hair, the court said "that the exercise of a constitutional right cannot be curtailed because of an undifferentiated fear that the exercise of that right will produce a violent reaction on the part of those who would deprive one of the exercise of that constitutional right."

The school was ordered to readmit the student and to expunge from his school record all absences and evidence of the suspension. The court also enjoined the school authorities from any further enforcement of the haircut regulation.

Zachry v. Brown
299 F. Supp. 1360
United States District Court, N.D. Alabama, S.D., June 30, 1967.

Two students at Jefferson State Junior College sought injunctive relief against officials of the college. Both students had been "administratively withdrawn" by the college officials for failure to conform to the rules and regulations pertaining to permissible hair styles for male students.

Both boys were members of a band which had adopted "page-boy" hair styles. The court found it clear that the insistence of the officials that the boys be withdrawn was motivated by their dislike of long hair. There was no suggestion that the hair style of the students had any affect upon the health, discipline, or decorum of the institution.

The court noted the wide latitude permitted public colleges to classify students with respect to dress, appearance, and behavior must be respected and preserved by the courts, but that the equal protection clause of the Fourteenth Amendment required that the classifications be on a reasonable basis. In the opinion

of the court, the classification of male students at the college by their hair styles was unreasonable and failed to pass constitutional standards.

The injunction requested by the students was issued.

California

Meyers v. Arcata Union High School District
75 Cal. Rptr. 68
Court of Appeal of California, First District, Division 4, February 10, 1969.

A high-school student who was suspended for wearing long hair, brought suit to compel the school authorities to reinstate him. The trial court granted the requested relief, and the school district appealed.

A school regulation with respect to student dress and appearance provided that "extremes of hair styles are not accepted." The extremes were not defined, and the student was never told how much of a haircut was required to produce and acceptable style.

On appeal the school authorities contended without success that the dress policy was a reasonable exercise of the governing board's rule-making power in the area of student discipline, and that it was not constitutionally unenforceable by reason of its language. They also asserted that long hair could be disruptive in the classroom. The court held that a long hair style is entitled to constitutional protection as a freedom of expression. Quoting from another California case, the court said that not every limitation upon the exercise of secondary students' constitutional rights by a school district is prohibited, and where there is empirical evidence that an aspect of the students' dress or appearance has a disruptive effect within a school, the board may prohibit it. Since there was some evidence of disruptive conduct, the court said that the school district could have required the student to wear his hair at a shorter length by promulgating a valid rule.

The court decided further that the school dress policy was vague and standardless, and hence unconstitutional. What constituted "extreme" in hair style was never defined other than as a "deviation from acceptable wear." The individual school officials alone could decide what was extreme. For these reasons the dress policy could not be upheld.

The judgment of the lower court was affirmed, and the student was ordered readmitted.

Noonan v. Green
80 Cal. Rptr. 513
Court of Appeal of California, Third District, September 4, 1969.

A suspended high-school girl sought a writ against the school district to prohibit it from enforcing a requirement on uniform-type dress and to compel her reinstatement. The student had been suspended from school for violating the school requirement that all female students wear uniforms four days a week. The girl objected to wearing the uniform on the ground that the requirement was unreasonable and a violation of her constitutional rights. Three days after the suspension, the girl's parents were served a notice that the board of trustees would meet in a special session to consider her possible expulsion. Prior to the meeting this suit was filed. The trial court found the rule unreasonable, and the school appealed.

The issue before the appellate court was whether the student was required to exhaust her administrative remedy before resorting to the court. The record revealed that the school did not offer any evidence at the trial court hearing to show that the requirement related to the enhancement of a free public education or that the benefits gained by the rule outweighed the student's right to self-expression in dress. Instead of evidence there was a stipulation that the evidence would have been "that the use of these uniforms in the opinion of the board is to promote more democratic policy among the girls and to eliminate the clothes competition between the girls attending the school." Also, the record was vague as to whether the requirement was a rule, a regulation, or a policy. The district operated six high schools and the uniform requirement was in effect in only one. It appeared to have been adopted in 1926 at the request of the girls then attending the school.

In considering whether there was an administrative remedy open to the pupil and if so, whether she should have exhausted such remedy before resorting to the courts, the appellate court reviewed the applicable statutes. The California Education Code provided for notice to the parents after the third day of suspension and for a hearing. Apparently under this provision the notice of hearing was sent to the girl's parents. At the trial court the parties purported to waive any right to exhaust administrative remedies. They stipulated that had the hearing been held, the school board would have upheld the policy of the high school.

The appellate court said that in view of the many uncertainties in the case, the mere stipulation that the county board would uphold the policy of the high school could not take the place of the hearing required by California law. The court noted that the general policy of the law is that administrative remedies of hearing

and appeal must be exhausted and that the parties to an administrative proceeding may not waive the benefits of a statute established for a public reason, nor may jurisdiction be conferred upon the court by consent. Because of the failure of the parties to pursue their administrative remedies as provided by law, the court ruled that the trial court had no jurisdiction to determine the matter.

The judgment of the lower court was reversed, and the petition was dismissed.

Indiana

Crews v. Cloncs
303 F. Supp. 1370
United States District Court, S.D. Indiana, Indianapolis Division, September 17, 1969.

A high-school student sought injunctive relief against school authorities to require them to readmit him to school without his first complying with the hair-length regulation. He claimed that his suspension from school violated procedural and substantial due process under the Fourteenth Amendment.

The student last attended regular school during the 1967-68 school year. To stay in school that year he cut his hair to comply with the regulation that hair length be "above the collar, above the ears and out of the eyes." At the close of that year the student was informed that he would have to cut his hair if he wished to return to the school the following year. Rather than do so, the student chose to attend night school. In the spring of 1969, the student again sought admission to day school. At the student's request, a hearing was then held at which he was represented by his father and his attorney. Following the hearing the school board held a special meeting at which the suspension of the student was confirmed. This action was then commenced.

The school board contended that the basis for its rule on hair length is contained in its inherent authority to promulgate reasonable rules and regulations. There was testimony by school officials and teachers that long hair on boys created disruption and discipline problems. The school authorities also contended that unusual hair styles disrupt the classroom, impede decorum, cause disturbances, and distract other students in the classroom, so as to interfere with the educational process.

The student contended that he was denied procedural due process; as to this, the court noted that on at least two occasions the student had complied with the rule, and that a hearing was held at which he was represented. The court ruled that the hearing was adequate and had met due process requirements.

The student contended also that the action of the school authorities constituted an unjustifiable infringement of his substantive due process rights. He asserted that the wearing of long hair was symbolic speech protected by the First Amendment. Assuming without deciding that the student's hair style constituted symbolic speech, the court said that the right of free expression is not absolute and could be infringed upon the showing of a compelling reason. The state has an interest in maintaining an orderly and efficient school system, and conduct which has the effect of bringing about disruption, whether intended or not, may be proscribed within reason. Based on the evidence, the court found that the student's appearance caused disturbance and disruption of the educational process both in the academic classroom and during the physical education classes. It was important to note, the court said, that the disruption resulted from the student's appearance, not from the fact that he violated the regulation. The court concluded that although the student's conduct may have been protected under the First Amendment, his substantive due process rights were not infringed because his conduct directly and materially interfered with a vital interest of the state.

The student argued further that the rule against long hair constituted an arbitrary and unreasonable classification and that his suspension constituted a denial of equal protection of the law under the Fourteenth Amendment. The court disagreed, noting that it is only invidious discrimination which is prohibited. In view of the disruption shown to have resulted, no unreasonable conditions were attached to the student's continuing his education in the school.

Also rejected by the court was the argument of the student that his right to privacy was unconstitutionally infringed, in that a high-school student has a fundamental personal right of free choice in how he wears his hair. Even if a hair style is included in the right to privacy, it is not an unrestricted right, the court said. The school board had justified its regulation by the showing of classroom disruption which resulted directly from the hair style of the student.

The court concluded that the law was with the school authorities and against the student. Accordingly, the student was not entitled to an injunction requiring the school to readmit him without first complying with the hair-length regulation.

Massachusetts

Richards v. Thurston
304 F. Supp. 449
United States District Court, D. Massachusetts, September 23, 1969.

A suspended high-school student sued the principal of the high school, seeking to be restored as a member of the senior class. The

student alleged that he had been suspended on the sole ground that he refused to have his long hair cut to an extent approved by the principal. The student contended that he had a cause of action under the Civil Rights Act and under the Fourteenth Amendment.

The court found no evidence of a formal written regulation relating to the length that a student could wear his hair. Nor had any party to the action shown any reason for the principal's official action, except possibly his own prejudice, community conventions, or the views of the student's contemporaries. No factual foundation was presented, showing that the hair style of the student created a health or sanitary risk to himself or others, that it interfered with his or other students' performance in school, or that the hair style created a disciplinary problem. The court was also unable to find any provision of Massachusetts law that regulated hair styles of school pupils.

The court said that it could be argued that principals of public schools were free to set their own standards for their own pupils since a pupil is not required to attend a public school and may attend a private school if it is more to his taste. However, the court felt that recent decisions are contrary to this view. The current cases indicate "that the state has not upon an arbitrary basis an absolutely unlimited right to refuse, opportunities such as education in the public schools, or employment in the public service." The personal liberty of a minor as well as an adult has a high order of importance, and the state cannot arbitrarily infringe upon it without making a strong showing of need.

The court summarized by saying that the state in this case "has no such rational ground for dictating hairstyle to a pupil in a general high school as to support an official order interfering with his liberty to express in his own way his preference as to whatever hairstyle comports with his personality and his search for his own identity."

The court concluded that the student's claim to liberty as to his appearance was entitled to protection from actions of the state or its agents under the broad terms of the due process clause of the Fourteenth Amendment and under the Civil Rights Act. Accordingly, the court entered a decree requiring that the student be reinstated in good standing and that any notation of the suspension be expunged from his record, and enjoining the principal from disciplining or suspending him because of his hair style.

Wisconsin

Breen v. Kahl
296 F. Supp. 702
United States District Court, W.D. Wisconsin,
February 20, 1969.
Review denied, 90 S.Ct. 1836, June 1, 1970.

Two male high-school students brought an action challenging the haircut regulation of the Williams Bay, Wisconsin, board of education. Both had been expelled from school because the length of their hair exceeded the standard of the board. One cut his hair and was readmitted, but at the time of the trial he desired to again grow it to a length that would be in violation of the regulation. No basis for the expulsion of the two was asserted other than the violation of the haircut standard. The school district did not assert that the length of the student's hair was a health problem or that it had caused any disturbance in the classroom.

The issue raised was whether the regulation as applied to the two students violated the Constitution of the United States. The court concluded that if such a regulation was applied to adults in the community, there would be no question that it would be unconstitutional. For adults the freedom to wear one's hair at a certain length would be constitutionally protected even though it expressed nothing but an individual taste. The freedom of adults to present themselves physically to the world as they choose is a highly protected freedom, the court said, and the state must bear a high burden of justification in the use of its power to impair this freedom. In this regard, the court commented:

> An effort to use the power of the state to impair this freedom must also bear "a substantial burden of justification," whether the attempted justification be in terms of health, physical danger to others, obscenity, or "distraction" of others from their various pursuits. For the state to impair this freedom, in the absence of a compelling subordinating interest in doing so, would offend a widely shared concept of human dignity, would assault personality and individuality, would undermine identity, and would invade human "being." It would violate the basic value "implicit in the concept of ordered liberty"....It would deprive a man or woman of liberty without due process of law in violation of the Fourteenth Amendment.

The question in this case then became whether a regulation that could not be imposed upon adults could be imposed on students.

The school board contended that it could regulate hair length of the students because they are public-school students and because they are no more than 16 or 17 years of age. The

court ruled that neither reason standing alone was sufficient. While school district regulations are not immune from judicial scrutiny, interference should not occur without good reason. However, school districts cannot make and enforce rules just for the sake of exercising authority. There must be justification for a regulation which invades the freedom of a student.

The justification asserted by the school board was that long hair distracted other students from their school work and that students whose appearance conforms to community standards perform better in school academically and in extracurricular activities than those students whose appearance does not conform. However, no empirical evidence was offered by the board to substantiate either "justification." Because of the lack of evidence the court held that the regulation limiting the length of students' hair, requiring male students to be clean shaven, and prohibiting long sideburns violated the due process clause of the Fourteenth Amendment. The school board was enjoined from enforcing the regulation. The students were ordered readmitted, and all evidence of the explusion was ordered expunged from their records.

The Supreme Court declined to review the case.

Protests and Demonstrations

Alabama

Scott v. Alabama State Board of Education
300 F. Supp. 163
United States District Court, M.D. Alabama, N.D., May 14, 1969.

Approximately 50 students of Alabama State College who had been suspended or dismissed because of their participation in demonstrations which closed the college, sought an injunction forcing their reinstatement. They alleged that their activities were protected by the First Amendment, and that the college procedure did not satisfy due process requirements. The president and other officials of the college filed a counterclaim which sought injunctive relief against continuing actions of the students which interfered with the operation of the college. A temporary injunction had been granted on the basis that the students who had been suspended had refused to leave the campus and had attempted to prevent other students from attending classes.

Originally about 80 students had been served with formal statements of charges. These had been on a form letter listing 11 charges with the ones deemed applicable to the particular student marked with an X. The letter advised the students of the date of the hearing and informed them that they would be afforded an opportunity to be heard and to present witnesses in their defense. At the hearing, counsel representing about 50 of the students requested that the charges were unduly vague and that they be made more definite. When this request was denied, he and the students on his advice refused to participate in the hearings. The hearings were held, and as a result seven students were dismissed, 43 were indefinitely suspended, 21 were found not guilty; three cases were disposed of otherwise. The president offered the dismissed and suspended students an opportunity to have their cases reviewed, and of those who availed themselves of it at least eight had their indefinite suspensions reduced to special probation.

In this action the students again attacked the vagueness of the charges. The court found that some of the charges did lack the specificity required to enable a student adequately to prepare defenses against them. However, all but three of the students had been presented with at least one specific charge. For those students who had been notified of and found guilty of one satisfactorily specific charge, the court concluded that the dismissals or suspensions would not be held procedurally inadequate on grounds of vagueness of the charges. The court ordered the three reinstated pending a further specification of the charges and another hearing.

Having decided that the substantial majority of the dismissed and suspended students had not been denied procedural due process, the court considered the question of whether the dismissals or suspensions violated substantive rights protected by the First Amendment. The issue was whether the activities which the college described as "the seizure, occupation, and unauthorized use of the dining hall" and described by the students as a "demonstration" are protected by the First Amendment. The students argued that irrespective of the college's interest in the orderly operation of the dining hall, their conduct was protected symbolic speech because in this manner they intended to communicate their dissatisfaction with certain conditions at the college. The students also contended that their conduct was protected because the conduct was largely peaceful and nonviolent and involved little if any destruction of college property. The court did not agree with these contentions and said that the students must expect to be punished when they violate laws and college regulations which are part of a system designed to protect the rights and interests of all.

In their counterclaim, the school officials alleged that the students had refused to leave the campus following their dismissals and suspensions, that they had engaged in activities

designed to reverse the administration's position, and that such activities had interfered with the rights of other students and otherwise disrupted the orderly operation of the college. The court had issued a temporary restraining order against the acts complained of. In making the injunction permanent, the court said that the students may not resort to direct action on the college campus for the purpose of exerting direct pressure on the officials of the school to change their decisions concerning the dismissals and suspensions.

The dismissals and suspensions of all but three of the students were upheld.

California

Furutani v. Ewigleben
297 F. Supp. 1163
United States District Court, N.D. California, March 25, 1969.

Suspended junior-college students sought an injunction against college officials to prevent them from holding expulsion hearings pending the disposition of criminal charges against the students. The students had been charged by the college authorities with unlawful actions during campus demonstrations, and were suspended pending the determination of these charges. Criminal charges had also been brought against the students in state court for the same actions. At the time this suit was filed, the criminal charges had not been heard nor had campus disciplinary hearings been held. There was a procedure by which the students could have obtained prompt hearings on the campus charges.

The students asked the court to issue an order to require the school officials to postpone any expulsion hearings until after the criminal trials and to reinstate them pending the completion of all proceedings. They argued that if they were not reinstated immediately, they would suffer irreparable damage; that if they were given prompt hearings by the school trustees, they might have to testify to avoid expulsion; that if they testified under compulsion of being expelled, they would lose their Fifth Amendment rights because their testimony before the trustees could be used against them in the subsequent criminal trials.

In support of this position, the students cited a decision of the Supreme Court of the United States which held that if police officers testified at a state investigation under penalty of losing their jobs if they did not, their testimony could not be used against them at a criminal trial. The court stated that the case cited illustrated the fallacy of rather than support for the students' contention. If the students wished prompt hearings, they need only notify the college. If at the hearings they are forced to incriminate themselves to avoid explusion they could invoke the case they cited to prohibit such testimony from being used against them if it is offered at their criminal trials. Therefore, the expedited college hearings posed no threat to their Fifth Amendment rights.

The students' motion for a preliminary injunction was denied.

Iowa

Tinker v. Des Moines Independent Community School District
89 S.Ct. 733
Supreme Court of the United States, February 24, 1969.

(See Pupil's Day in Court: Review of 1967, p. 61; Review of 1966, p. 54.)

School officials in Des Moines became aware of a planned protest against the Vietnam conflict and adopted a policy that any student who wore a black armband to school and refused to remove it when asked, would be suspended. Five students were suspended when they took part in this silent protest against the war. After the planned period of protest the students were readmitted to school. They then sought an injunction in federal district court restraining the school officials from disciplining them, and they also sought nominal damages. That court upheld the suspension, and the equally divided U.S. Court of Appeals for the Eighth Circuit affirmed the decision without opinion. The Supreme Court granted a review.

The district court upheld the constitutionality of the school authorities' action on the ground that it was reasonable in order to prevent disturbance of school discipline. Although the district court recognized that the symbolic act of the students was within the Free Speech Clause of the First Amendment and that there was no evidence of disruptive conduct at the schools because of the activities of the students, it upheld the action of the school authorities. That court concluded that the suspensions were reasonable because the authorities feared a disturbance from the wearing of the armbands. The Supreme Court said, however, that "in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression."

On its independent examination of the record, the Supreme Court found no evidence that the school authorities had reason to expect that the wearing of the armbands would substantially interfere with the work of the school or impinge on the rights of other students. Rather, "the action of the school authorities appears to have been based upon an urgent wish to avoid

the controversy which might result from the expression, even by the silent symbol of armbands, of opposition to this Nation's part in the conflagration in Vietnam." The evidence also showed that the school authorities made no attempt to regulate other symbols of political or controversial significance. Here a particular symbol was singled out for prohibition.

The Supreme Court ruled that the students had the right to express their opinion in the form that they did because they neither disrupted school activities nor sought to intrude in school affairs or in the lives of others. The Court said:

> School authorities do not possess absolute authority over their students. Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.

The decisions of the lower courts were reversed, and the matter was remanded to those courts to determine the form of relief.

Kentucky

O'Leary v. Commonwealth
441 S.W. 2d 150
Court of Appeals of Kentucky,
May 9, 1969.

Four students at the University of Kentucky appealed their conviction for breach of the peace. The students had been arrested following their refusal to move from the doorways of rooms to be used by the Defense Intelligence Agency recruiters of prospective employees. Prior to the demonstration the dean had set out ground rules for the protest. The students had been informed that if they blocked access to the placement service rooms, they would be arrested.

The students argued that their convictions were void because the breach of the peace statute was unconstitutionally vague. In rejecting this argument, the court commented on the meaning of the term "breach of peace" and noted that not only violent conduct but conduct likely to produce violence is included in breach of peace. However, the definition has not been construed in this jurisdiction to mean that lawful and proper conduct may constitute a breach of the peace just because it provokes violence or disorder. Rather, it has been recognized that lawful exercise of the constitutional right of assembly cannot be a breach of peace. Therefore, the court did not think that the law against breach of peace as it has been construed in the state is so vague or overly broad in scope as to pose any threat to the rights of free speech and assembly.

Also rejected by the court was the argument of the students that even if the statute was not void for vagueness, it could not be applied to any attempt to exercise First Amendment rights. The court held that the sanctity of a college campus or building was no less than that of private property. As students they had a right to be on campus, but this right did not extend to their being in any place where they had been told not to go. Once the students were asked to leave and refused, their conduct took on a different significance. Then an exercise of otherwise constitutional activity was no longer protected. There need not be, as contended by the students, a statute designed to meet the specific events of the situation. The court said that the dean had a right to ask the students to clear the area and their refusal authorized their conviction for a breach of peace.

Louisiana

French v. Bashful
303 F. Supp. 1333
United States District Court, E.D. Louisiana,
New Orleans Division, September 18, 1969.

Ten students at Southern University in New Orleans brought a civil rights action to compel the school to reinstate them as students in good standing. They also sought a declaratory judgment that their suspensions and expulsions were unconstitutional. Some of the students were suspended and some were expelled for participating in campus disturbances on two occasions in May 1969.

The students alleged that they were denied procedural due process at the hearings held before the University Discipline Committee in that their retained legal counsel was not allowed to take part in the proceedings.

The court noted that the leading case in the area of student rights at tax-supported institutions is Dixon v. Alabama Board of Education (294 F. 2d 150, 1961). That case sets out what procedures must be followed to guarantee due process for the student. The court found that for the most part the hearings were conducted in a fair and impartial manner. The students were given advance notice of the charges against them. They were permitted to call their own witnesses and to cross-examine them.

On the issue of the right of the students to be represented by legal counsel, the court commented that the students were faced with the loss of an extremely valuable right, a college education. Thus, while the right to counsel is not listed as one of the necessary elements of due process in the Dixon case, it could not be denied that the assistance of counsel in a trial-type proceeding was of value. The prosecution of the students was conducted by a senior law student who had since become a member of the state bar. He was chosen to prosecute the cases because of his familiarity with legal proceedings. Under these circumstances the court held that the students were denied procedural due process in that their retained attorney was not permitted to represent them. The court made it clear that the holding was limited to retained counsel, as opposed to appointed counsel, and that the university would not be directed to provide counsel for students who did not have their own.

The court also found that the proceedings were faulty in that the report of the findings of the Discipline Committee had not been put into a report open for the students' inspection, as required by the Dixon decision.

The court did not order the reinstatement of the students, but directed the university to hold new hearings at which the students would be entitled to have retained counsel represent them and at which the findings would be put into a report open to the students for inspection.

The students also contended that the regulations under which they were charged were vague, and did not specifically cover demonstrations and sit-ins. The court rejected these contentions as being without merit because the forcible occupation of university offices and buildings here involved could never be considered as anything but conduct designed to disrupt the normal activities of the university. The conduct for which the students were disciplined did not fit the standards in the regulation which required that students engage in "responsible social conduct that shall reflect credit upon the University."

An appeal has been filed in the Supreme Court of the United States (38 U.S. Law Week 3524).

Missouri

Esteban v. Central Missouri State College
415 F. 2d 1077
United States Court of Appeals, Eighth Circuit, August 28, 1969; rehearing denied October 3, 1969. Review denied, 90 S.Ct. 2169, June 15, 1970.

(See Pupil's Day in Court: Review of 1968, p. 13-14.)

Two students were suspended for two semesters for participation in demonstrations at Central Missouri State College in March 1967. Following their suspensions, the students filed complaints in the district court. That court decided that they had not been afforded procedural due process and directed the college to grant them a new hearing. At the new hearing it was found that the suspensions of the students were proper. The students once again brought suit, which was dismissed. The students appealed, claiming that the findings of the trial court were erroneous; that the college's regulation and action violated rights of freedom of speech and of peaceful assembly and petition; and that the regulation was so vague as to deny substantive due process.

According to the facts, the demonstrations took place on two consecutive evenings at the intersection of a public street adjacent to the campus and a state highway. As a partial result of the demonstrations there was some damage to college property, traffic was blocked, and cars were rocked. A number of college personnel were directed to go to the scene and restore order.

One of the suspended students had been asked by a faculty member to leave the scene of the demonstration and return to his dormitory. He refused to return or give his name. After finally going into the dormitory, he used vile language and threats toward a resident assistant who gave the student's name to the faculty member.

The second student had been on disciplinary probation prior to the mass demonstration. He had questioned the dean regarding possible repercussions of his involvement in demonstrations and wrote to his representative in the state legislature indicating his participation in future demonstrations. He was part of the crowd on both nights but maintained that he was just a spectator. The district court had held that his actions were such as to make him a participant.

The appellate court ruled that there was adequate support for the findings of the district court that both students were participants in the demonstration, and that the findings were not clearly erroneous.

As to the contention of the students that their First Amendment rights were violated, the appellate court pointed out that a student does not forfeit his rights by attendance at a tax-supported college, but neither does he enjoy an unfettered right to do as he wishes. School officials within a framework of constitutional standards can regulate student conduct. The court quoted from the Tinker decision (see page 52 of this report) that "conduct by the student in class or out of it, which for any reason--whether it stems from time, place, or type of behavior--materially disrupts classwork or involves substantial disorder or invasion of the

rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech." The findings in the present case, which were sufficiently supported by the record, the court said, also involved aggressive and violent conduct rather than a peaceful, nondisruptive expression of opinion. Therefore, the court held that the acts engaged in by the two students were not within the realm of constitutionally protected activity.

The students also attacked the regulations as being vague and overbroad. The regulations provided that "all students are expected to conform to ordinary and accepted social customs and to conduct themselves at all times and in all places in a manner befitting a student of Central Missouri State College.... Participation in mass gatherings which might be considered as unruly or unlawful will subject a student to possible immediate dismissal from the College." As to the argument of vagueness and overbreadth, the court noted that the charges against the students did not even refer to the regulations; rather the students were disciplined for defiance of proper college authority. Nevertheless, the court did not find that the regulations were ambiguous or overbroad.

The court made it clear that it did not hold that any college regulation, however loosely framed, was necessarily valid. Nor did the court hold that a college could require a student to discard any constitutional right. However, it did hold that a college has an inherent right to promulgate rules and regulations, to discipline students, to protect itself and its property, and to expect that its students adhere to generally accepted standards of conduct; and as to these standards, flexibility and elbow room are to be preferred over specificity. Further, procedural due process must be afforded to students by way of notice, definite charge, and a hearing with an opportunity to present their side of the case, and with all necessary protective measures.

The court concluded that the students had not been denied any constitutional rights.

New York

Board of Higher Education v. Students for a Democratic Society
300 N.Y.S. 2d 983
Supreme Court of New York, Special Term, Queens County, Part III, June 9, 1969.

Queensborough Community College sought an injunction against individual students and faculty members, a chartered campus organization, and an unauthorized organization existing on the campus. The defendants had been participating in a sit-in demonstration on the fourth floor of a library-administration building from April 21 until May 7, 1969. It was started in protest against nonreappointment of a professor. There had been substantial damage to college property. The college sought to enjoin the sit-in and any other demonstrations and acts of violence that interfered with the normal functions and educational process at the institution.

The fundamental question before the court was whether it had the power to issue the requested injunction. The court held that it did because the conduct of the students and faculty members constituted a continuous trespass. There was no question that the demonstrators had caused irreparable injury to the college and its normal educational and administrative procedures and that the remedy at law was inadequate in that a multiplicity of suits would be needed to give relief against the continued disruption.

The demonstrators contended that an injunction was not proper because a public facility was involved. The court did not agree, citing a case which held that when the trespass is on a public facility there is even greater reason to enjoin it than when private facilities are involved. The court found no merit in the contention that students possess the right to occupy the facilities of a public university. The school buildings were not a public place to the extent that the students could make any use of them that they wished.

The court also disagreed with the contention of the demonstrators that an equity court cannot enjoin the commission of a crime. In this regard, the court relied on a leading case holding equity seeks to protect some proper interest, and if the interest to be protected is one that equity will take cognizance of, a court will not refuse to take jurisdiction because the act which invaded the interest is also punishable under the penal laws of the state.

Finally, the students and other demonstrators contended that their action was constitutionally protected and therefore could not be enjoined. The court found no merit to this argument, saying that where, as in this case, protest becomes violent and in essence deprives others of their right to pursue their studies in a relatively tranquil atmosphere, the protest is no longer privileged or protected.

Accordingly the court entered the injunction sought by the school officials. The defendants were prohibited from assembling in such a manner as to interfere with the normal functions of the college and from employing force or violence against persons or property on the campus.

Pennsylvania

Einhorn v. Maus
300 F. Supp. 1169
United States District Court, E.D. Pennsylvania, June 27, 1969.

Twelve students who had worn armbands at their high-school graduation sought to enjoin school officials from placing upon their school record or from communicating to any school, college, university, or employer the fact that the student had worn an armband or distributed literature at the graduation or that such students ignored an order of the school authorities not to engage in such action.

The school district intended to send this information to the colleges and universities that the students would be attending in the fall.

The court denied the preliminary injunction to the students because they made no showing of threatened irreparable harm to them from the proposed communication of factual information to the institutions of higher learning.

Tennessee

Jones v. The State Board of Education of and for the State of Tennessee
407 F. 2d 834
United States Court of Appeals, Sixth Circuit, February 19, 1969.
Appeal dismissed, 90 S.Ct. 779, Febr ary 24, 1970.

(See Pupil's Day in Court: Review of 1968, p. 19.)

Three students at Tennessee A & I State University brought suit against the school to force their reinstatement and to prohibit the university from suspending, expelling, or otherwise disciplining them. The district court upheld the action of the university, and the students appealed. The students had been indefinitely suspended pending their appearance before the Faculty Advisory Committee to show cause why such action should not be taken. Prior to their hearing, the students had been presented with a list of the specific charges against them. A lengthy hearing followed, at which the students were represented by counsel. The Committee then upheld its initial ruling.

The students contended that the procedures followed by the authorities denied them due process of law and that the conduct for which they were suspended was protected activity under the First Amendment. The court disagreed with both contentions and stated that there was substantial evidence of conduct other than the type which is entitled to constitutional protection.

The judgment of the lower court was upheld. The Supreme Court first accepted review and then dismissed the appeal as improvidently granted.

Wisconsin

Marzette v. McPhee
294 F. Supp. 562
United States District Court, W.D. Wisconsin, December 9, 1968.

Suspended Negro students at Wisconsin State University--Oshkosh sought a temporary injunction requiring state and school officials to reinstate them and all other suspended students. The suspensions grew out of events of November 21, 1968, when a group of approximately 90 Negro students invaded a university building. Many offices were ransacked, and the president was forcibly prevented from leaving his office. The following day most of the students involved in the disturbance received an identical letter of suspension from the president. The letter stated that if the student desired to appeal, a written request for a hearing must be made within 10 days.

On December 6, 1968, the board of regents adopted a resolution which provided that a special hearing agent be retained by the board to hear all alleged charges of misconduct arising out of the November 21 disturbance. The immediate issue before the court was whether the suspended students were entitled to reinstatement pending the holding of the disciplinary hearings and the resulting decisions. The university opposed their reinstatement on the grounds that suspension pending the hearing was a proper punishment for their actions and that reinstatement would endanger both the suspended and the other students.

The court noted that students at public institutions are entitled to due process in any disciplinary proceeding. It also noted than many authorities subscribe to the belief that the status of the student should not be altered pending disposition of his case. The court found that the suspended students would be irreparably harmed by any significant extension of their suspension. Further, that the suspension was imposed and continued without due process of law.

Accordingly, the court ordered that the students be reinstated on December 11, 1968, and that such reinstatement be continued until final determinations were made with respect to their cases. However, the court also ordered that if the university served notice on the student of the charges against him and held a hearing no later than December 16, the student did not have to be reinstated. Reinstatements also did not have to be made if the university elected

to file a motion in the court to the effect that the safety of students, faculty, administrators, and university property depended on the reinstatements being deferred.

Soglin v. Kauffman
295 F. Supp. 978
United States District Court, W.D. Wisconsin, December 13, 1968.

Ten students at the Madison campus of the University of Wisconsin were suspended for their part in disruptions at the University when it was alleged that they blocked access to the Dow Chemical Company campus recruiter. The students challenged the regulations they were accused of violating. The students were sent itemized lists of their alleged actions which constituted "misconduct" and a violation of chapter 11.02 of the university rules and regulations. The university officials asserted their right to discipline students for the violations.

The students asserted that the term misconduct as a standard for disciplinary action, and chapter 11.02 as written violated the First and Fourteenth Amendments because of vagueness and overbreadth. They sought declaratory and injunctive relief.

After an extensive discussion of misconduct as a standard for discipline, the court concluded that a standard of "misconduct" without more, could not serve as the sole foundation for expulsion or suspension for any significant time throughout the entire range of student life in the university. The court declined to permanently enjoin the use of "misconduct" as a standard, preferring instead to let the students and members of their classes seek judicial review of the standard, case by case, as it actually is applied.

The court considered next the alleged violation of chapter 11.02, which provided that students could support causes by lawful means which do not disrupt operations of the university. The court noted that the language of chapter 11.02 did not lend itself readily to being construed as a prohibitory regulation, but that the university asserted that it intended to use it in this manner. Therefore, the court construed the language as "if it forbids students to 'support causes by means which disrupt the operations of the university, or organization accorded the use of university facilities.'" On the basis of this construction and the application of the constitutional standards of vagueness and overbreadth, the court found chapter 11.02 to be invalid since it did not contain any description of the kinds of conduct which might be considered disruptive nor did it draw any distinction among the various categories of university operations. In concluding that chapter 11.02 was unconstitutionally vague, the court said that "when the end can be more narrowly achieved, it is not permissible to sweep within the scope of a prohibition activities that are constitutionally protected free speech and assembly." The enforcement of chapter 11.02 was permanently enjoined.

Stricklin v. Regents of the University of Wisconsin
297 F. Supp. 416
United States District Court, W.D. Wisconsin, March 18, 1969.

On March 6, 1969, three students at the University of Wisconsin at Madison were suspended by the Board of Regents for participation in campus disorders. The students had been informed of the charges against them and of their right to a hearing to determine what punishment if any would be imposed. The hearing was scheduled for March 19, 1969. Pending the hearing, the students were suspended from the college. The students sought a declaration that their suspensions were a violation of the due process clause of the Fourteenth Amendment. They also sought a temporary restraining order requiring their reinstatement.

Prior to the March 6 meeting of the Board of Regents that suspended the students, none of them was informed that a meeting would be held, nor were they furnished with a copy of the charges against them, nor any opportunity to be heard. No hearing was ever held on the question of whether the suspension should continue pending final deposition of the case. The school officials did not contend that the suspensions were a disciplinary action for the acts committed, but rather that the suspensions were necessary because the continued presence of the students on campus would endanger persons and property on the campus. The university contended that under these conditions students could be suspended, without specification of charges, notice of hearing, or hearing, until the time when a final deposition is reached following a hearing.

The court defined the case as involving an interim suspension in the absence of a preliminary hearing, pending the holding of a full hearing followed by a decision on whether to impose a serious ultimate sanction. The court then referred to a "Joint Statement on Rights and Freedoms of Students" issued by several national faculty and student groups. That statement provided that students who were awaiting final action on charges should have the right to attend class "except for reasons relating to his physical or emotional safety and well-being, or for reasons relating to the safety and well-being of students, faculty, or university property." In an interim opinion in this case the court concluded that the students had discharged their initial burden of showing that they had

been suspended without a preliminary hearing. In this decision, the court concluded that the burden had shifted to the college officials to show that the suspensions were required by reasons relating to the physical and emotional safety and well-being of these students and other students, faculty, or other university personnel or university property. The standard set out by the court was the same as the standard in the aforementioned "Joint Statement." According to the court, the standard involved two elements: danger and timing.

The court held that an interim suspension could be imposed when the college officials had reason to believe that danger will be present if a student is permitted to remain on campus, pending a decision following a full hearing. But even if the element of danger is present, an interim suspension may not be imposed without a preliminary hearing, unless it can be shown that such a hearing would be impossible or unreasonably difficult to accord the student. The court noted that the Regents had a rule that provided a student with an immediate hearing on the limited question of whether the suspension should remain in effect, pending the full hearing, but that they had not followed that rule in this case.

The court found that the students would be irreparably harmed by a continuation of the interim suspension. Accordingly, on the basis of the record in this case, the court ordered that each of the students be reinstated on March 19, with the same rights he enjoyed prior to his suspension, provided nothing would prevent the school officials from holding a preliminary hearing and imposing an interim suspension on the condition that the requirements of due process were followed. The opinion further provided that nothing would prevent the officials from proceeding with the full hearing that was scheduled for March 19, 1969.

Publication and Distribution of Literature

Alabama

Troy State University v. Dickey
402 F. 2d 515
United States Court of Appeals, Fifth Circuit, October 21, 1968.

(See Pupil's Day in Court: Review of 1968, p. 9, Alabama State Board of Education v. Dickey.)

This action was brought after Troy State University denied readmittance to the student editor of its newspaper because he substituted his own editorial in place of one approved by the faculty advisor. The trial judge ordered the college to readmit the student. At the time the appellate court heard the appeal, the student was uncertain of his intention to reenter the school. A final determination by the appellate court was postponed until the student reached his decision. The student subsequently decided not to return to Troy State. Both parties declined to press the question of mootness and urged the court to reach a decision on the merits.

The court said that the parties cannot enlarge the power or affect the duties of the court to make inquiry into and decide the question of mootness. The court found no merit in the contention that its failure to rule on the merits of the controversy had the effect of sustaining the lower court order and establishing a precedent in cases involving an institution's power to require political orthodoxy of its student newspaper editors, since by vacating the judgment of the lower court any precedential effect was taken away.

The court was convinced that the case was moot. The judgment of the district court was vacated, and the case was remanded to that court with directions to dismiss the proceedings as moot.

Illinois

Scoville v. Board of Education of Joliet Township High School District 204
415 F. 2d 860
United States Court of Appeals, Seventh Circuit, September 25, 1969.

Reversed 425 F. 2d 10. (7th Cir. April 1, 1970) (en banc).

(See Pupil's Day in Court: Review of 1968, p. 12.)

Two high-school students appealed from the order of the lower court dismissing their complaint. They had alleged that their First and Fourteenth Amendment rights had been violated and sought injunctive and declaratory relief and damages. While in their junior year, the students had been expelled from high school for distributing a publication on school grounds. The publication, prepared away from the school, contained an editorial critical of the school administration and procedures, and urged students to disregard school procedures.

The students contended that the expulsion order violated their constitutional rights and that the expulsion was beyond the authority of the school board under state law. The lower court had found that distribution of the publication constituted a direct and substantial threat to the effective operation of the high school. It also concluded that the school board had not exceeded its delegated authority under state law.

By the time the appeal was heard, the initial relief sought had been rendered moot, for the students had been reinstated and had graduated from high school. However, they also sought an order directing the school board to expunge all record of the expulsion from their transcripts, and restraining the school authorities from communicating to any colleges or potential employers the substance of the events leading to the disciplinary action.

The appellate court stated that while the First and Fourteenth Amendments protect the rights of students against unreasonable rules and regulations of the board, reasonable action by school officials which is necessary to maintain order and discipline is permissible even though this may to some degree infringe upon freedom of speech and press. After careful consideration of cited legal principles, the court was of the opinion that the school authorities acted reasonably in expelling the two students despite their contention that the distribution of the publication failed to have the immediate effect of disrupting school routine.

The students also contended that in expelling them the school officials exceeded their delegated authority under Illinois law. The appellate court noted that judicial review of the action of a school board is limited to a determination of whether the action of the board is the result of "fraud, corruption, oppression or gross injustice." School boards are also given discretion under the law in deciding when the conduct of a student constitutes "gross disobedience or misconduct." Having determined that the publication in question was not entitled to First Amendment protection, the court was of the opinion that the school authorities had acted reasonably within the broad discretionary powers they had under state law. The judgment of the lower court was upheld.

Note: On reconsideration by the entire Court of Appeals for the Seventh Circuit, this decision was reversed. An appeal has been filed in the Supreme Court of the United States (39 U.S. Law Week 3037).

New York

Schwartz v. Schuker
298 F. Supp. 238
United States District Court, E.D. New York,
March 27, 1969.

A high-school senior who claimed that he was suspended for exercising his First Amendment rights sued for a declaratory judgment and an injunction to prevent further deprivation of his rights and to mandate his reinstatement. He also asked for a preliminary injunction for immediate court action to enjoin his suspension.

The previous year the student had been warned that distributing unauthorized material on school grounds was not permitted and that further violation of the resolution would constitute a serious breach of school discipline. Subsequently the student advocated participation in a student strike. The principal called the parents to the school, but they defended their son's right to carry on student strikes. Later the principal conferred with the student about an underground newspaper and again advised him that the material could not be distributed on school grounds. Four days later the boy appeared on school grounds with copies of the publication. He refused to surrender these copies when requested to do so and advised a younger student to likewise refuse the same order. As a result of these actions the student was formally suspended. Nevertheless, he reappeared in the classroom at his mother's instruction. After a hearing on the suspension, the school superintendent recommended that the student be graduated on January 31, 1969, or be transferred to another school. Neither option was exercised by the boy or his parents.

In the court proceedings, the student complained that he was never charged with or had a hearing upon any alleged violation of school regulations. The court dismissed this charge on the ground that the applicable administrative procedures were followed by the school authorities. The court noted also that state law provides for an appeal to the state commissioner, but the boy and his parents did not choose to take advantage of this procedure.

The court disagreed with the student's contention that his First Amendment rights were violated. In the context of the affidavits submitted by both sides, the court said, it appeared far from clear that the suspension was because of protected activity under the First Amendment. Rather, the student had followed a pattern of gross disrespect and flagrant and defiant disobedience of school authorities. The school must balance the First Amendment rights of the students against its duty and obligation to educate students in an orderly manner and to protect the rights of all students. Under the facts disclosed by the affidavit, the court found no basis for a preliminary injunction and denied the application of the student.

Segall v. Jacobson
295 F. Supp. 1121
United States District Court, S.D. New York,
February 12, 1969.

A high-school student had been involved in disruptive activities at the school. Following several conferences with the school authorities, he promised in writing "to obey school rules and not to involve himself in any activity which is not conducive to a proper school atmosphere." The student subsequently distributed a libelous

and scurrilous forged issue of the school newspaper in the school cafeteria. For this action he was suspended and subsequently after a hearing he was transferred to another school.

The student instituted a court action against the school authorities, seeking a preliminary injunction for retransfer to his former school. He asserted many constitutional rights which he alleged had been violated. The court, however, felt that to grant the requested relief would be tantamount to granting the student the relief that he would be entitled to only after a trial on the merits of the issue. The court said that the student had not made a clear showing of the likelihood of success at trial, nor had he shown that his transfer constituted irreparable injury. These elements are necessary to warrant the granting of preliminary injunction.

The motion for a preliminary injunction was therefore denied.

Zucker v. Panitz
299 F. Supp. 102
United States District Court, S.D. New York, May 15, 1969.

(See page 80.)

Other Disciplinary Activities

Mississippi

Brown v. Greer
296 F. Supp. 595
United States District Court, S.D. Mississippi, W.D., February 26, 1969.

Five Negro children sought a temporary restraining order and preliminary injunction against school officials. The children had been suspended following a session in the superintendent's office during which they used vulgar and abusive language toward the superintendent and others, struck two faculty members, and disrupted the normal routine of the school.

Following the altercation and suspension, letters were mailed to the guardians of the children informing them of the reasons for the suspension and of their right to a hearing before the board of trustees. No meeting between the parties was held prior to the filing of the suit.

The pupils charged that their constitutional rights were violated in that they were not accorded due process prior to their suspension. In deciding the question, the court attempted to balance the rights of the pupils against the interest of the state in maintaining an educational system requiring the formulation and enforcement of rules and regulations, including those pertaining to discipline. The court was convinced that there was no racial motivation behind the actions of the school officials. The only interjection of race had been made by the pupils.

The court concluded that there was an abundance of testimony to support the action of the board in suspending the pupils. The requested relief was accordingly denied.

New York

Drysdale v. University of New York at Stony Brook
302 N.Y.S. 2d 882
Supreme Court of New York, Special Term, Suffolk County, Part I, July 10, 1969.

Students at the state university at Stony Brook sought an injunction against the university to prohibit it from impounding and retaining possession of cars owned by students for failure to pay campus parking fines.

The students contended that the campus parking regulations were invalid because the section of the state education law under which they were established was an unconstitutional delegation of legislative power to the university. That statute gives each state institution the authority to make regulations governing the conduct and behavior of students, and the management of its grounds and facilities. It had previously been established judicially that this delegation of authority was constitutional. Accordingly, the court held that the parking regulations and the enforcement thereof were within the purview of this statute.

The students maintained also that the regulations had to be filed with the state department of education to be valid. On this point, the court ruled that parking regulations related to "internal management" of the university and did not have to be filed.

The court did note that nowhere in the parking regulations was authority conferred to impound motor vehicles parked in violation of the regulations and to retain their possession pending payment of past fines. In view of this, the court granted the application of the students to the extent that the university was enjoined from impounding motor vehicles and retaining them, pending payment of penalties imposed for past violations. This decision was not to be interpreted, said the court, as prohibiting the university from towing cars in violation of the parking regulations and retaining possession until towing charges were paid, as provided for in the regulations.

Howard v. Clark
299 N.Y.S. 2d 65
Supreme Court of New York, Westchester County, March 25, 1969.

A proceeding was brought to compel New Rochelle school officials to reinstate high-school students who had been suspended following their arrest for criminal possession of a hypodermic instrument. The policy of the school board mandated suspension of any student who was indicted or arraigned in any court for any criminal act of a nature injurious to other students or school personnel.

The question before the court was whether the board of education went beyond the powers conferred upon the superintendent under a section of the Education Law that sets out the limited grounds for suspension, among them, suspension of "a person whose conduct and mental condition endanger the safety, morals, health, and welfare of the other high school students with whom he would associate in the school." The school district alleged that the students could be suspended under this provision.

The court held that while the use of heroin by students off campus bears a reasonable relation to and may endanger the health, safety, and morals of other students, the bare charges against the students of possession of heroin did not justify their suspension on the statutory grounds that they were insubordinate or disorderly, or that their mental or physical condition endangered themselves or others.

The court found that the board of education had exceeded its power under the suspension statute. Accordingly, the court ordered that the students be reinstated and all evidence of the suspension be expunged from their records.

Ohio

State ex rel. Fleetwood v. Board of Education of Hamilton City School District
252 N.E. 2d 318
Court of Appeals of Ohio, Butler County, April 24, 1969.

The father of an expelled high-school student sued to compel the school district to readmit his son to school. The boy had been suspended by the principal for ten days on February 12, 1969. When he returned to school on February 26, 1969, he was expelled by the superintendent for the remainder of the semester. Both the suspension and the expulsion were based on the same incident. Notice of the suspension and expulsion was sent to the father within 24 hours of the occurrence, but the clerk of the school board was notified of both on March 4, 1969. Thereafter the school board held a hearing at which the boy was represented by an attorney. The expulsion was sustained, but the board authorized the boy's attendance at night or summer school sessions without cost.

The father argued that the boy had been punished twice for the same incident and that failure to send the notice to the clerk of the board within the 24 hours mandated by law nullified the expulsion.

The court saw the purpose in requiring that the parents of the suspended or expelled student be notified as soon as possible but the reasons for sending notice to the clerk within the same time period were less clear. The duties of the clerk were clerical and ministerial in nature. He was in charge of keeping the records of the school board. The court held that under these circumstances, the rights of the student had not in any way been jeopardized by the delay in notice to the clerk. The child's right of appeal to the school board was not impaired.

As to the argument that the student was being punished twice for the same offense in violation of his constitutional rights, the court said that the prohibition against double jeopardy applied only in criminal cases. Since state law provided that a principal could suspend a student, but authority to expel a student was given only to the superintendent, the court was of the opinion that the legislature intended that both persons could act upon the same offensive conduct of a pupil, but restricted the expulsion power to the school superintendent.

The court found no clear legal right of the student to compel the school board to readmit him. Accordingly, the writ requested was denied.

State ex rel. Humphrey v. Adkins
247 N.E. 2d 330
Court of Appeals of Ohio, Montgomery County, March 13, 1969.

The New Lebanon-Dixie High School appealed from a decision of the trial court which ordered it to furnish an expelled student with textbooks and a reasonable opportunity to take his examinations and receive his diploma. The student had been expelled by the superintendent shortly before graduation. His expulsion was confirmed by the board of education. The trial court found that while the expulsion by itself was not unreasonable or an abuse of discretion, the procedure used in the appeal hearing before the board of education was invalid. It also found that the refusal of the school to supply the student with books and an opportunity to receive his diploma was arbitrary and unreasonably punitive. Accordingly, the court ordered that the student be furnished with textbooks and be given an opportunity to take his second semester examinations. The school authorities appealed.

The controlling statute provided that a superintendent could expel a student and that such action could be appealed to the board of education. The statute also provided that the board could act on the expulsion only at a public meeting and could by a majority vote of the members of the board reinstate the pupil. No student could be suspended or expelled beyond the current semester.

The student argued on appeal that the board did not act upon the expulsion at a public meeting as was required by the statute. The court found this argument to be self-defeating. It held that since the board did not act to reinstate the pupil, the expulsion stood. The court noted that the evidence indicated that the student had been a continuing behavior problem in the school and that the incident which resulted in his expulsion had been one of many. Under the circumstances, the court concluded that neither the school superintendent nor the board abused discretion, or acted in an unreasonable arbitrary or capricious manner.

The court accepted and affirmed the holding of the trial court that the expulsion was lawful, but revised that portion of the trial court decree which ordered the school district to furnish books to the student and allow him to take his examinations since the lower court had no authority to attach these conditions to the expulsion.

LIABILITY FOR PUPIL INJURY

Connecticut

Plasse v. Board of Education of the Town of Groton
256 A. 2d 519
Superior Court of Connecticut, New London County, June 17, 1969.

The father of a pupil injured at a track meet brought suit against the coaches and against the school board. The theory of the case against the school board was the state statute which provided for indemnification for any teacher or employee of the school board for an amount recovered against him in an action arising out of his employment.

The board of education objected to the complaint on the ground that it failed to state any legal cause of action against it since under the state indemnification statute the board's liability, if any, is to reimburse the teacher or school employee for a judgment which might be rendered against him. No direct liability runs from the board to the injured party in a tort action. The father argued that the action against the board sought only to enforce the statutory responsibility of indemnification by making the board a party defendant.

The court sustained the school board, holding that while the coaches may have an action against the board should the father succeed in recovering against them, the father had no cause of action against the board under the statute. The court based its decision on a precedent that the statute provides for indemnification from loss, not from liability.

The complaint was dismissed as against the school board.

Illinois

Fustin v. Board of Education of Community Unit District No. 2
242 N.E. 2d 308
Appellate Court of Illinois, Fifth District, November 20, 1968.

A high-school basketball player was injured when without provocation he was struck in the face by a fist of a member of the opposing team. The incident took place during a game at the latter pupil's school. The injured player alleged that the board of education, through its agents, was negligent in its supervision of the offending player and the game. He also alleged that the board failed to maintain discipline of the players in violation of an Illinois statute which provides that teachers and other certificated personnel shall maintain discipline in the schools, that they stand in the position of loco parentis and that this relationship shall extend to all activities connected with the school program.

The board of education moved to dismiss the complaint, based on a statute which provided that except as otherwise provided therein, neither a local public entity nor a public employee is liable for an injury caused by a failure to supervise an activity on or the use of any public property. Other sections provide that an employee is not liable for an injury resulting from an act or omission involving the determination of a policy or the exercise of discretion and that a local public entity is not liable for an injury resulting from an act or omission of an employee if the public employee is not liable. Prior to trial the injured student amended his complaint to include the fact that the board had liability insurance to the extent of his claim. The lower court dismissed the amended complaint, and the pupil appealed.

The appellate court ruled that the fact that the board had seen fit to insure against liability in no way made it liable for all injuries sustained. The court felt that previous Illinois decisions held that a public employee is not liable in tort for injuries arising out of discretionary acts. The judgment of the lower court dismissing the complaint was, therefore, upheld.

Michigan

Jackson v. City of Detroit Board of Education
170 N.W. 2d 489
Court of Appeals of Michigan, Division 1, June 25, 1969; released for publication September 26, 1969.

A student who was injured at school appealed from the lower court decision which dismissed his complaint. The student had lost a finger when it was caught in an allegedly defective door closing mechanism. The day following the accident the student's attorney sent a letter to

the board informing it that he was representing the student relative to the injuries he sustained, and to notify its insurance carrier. The board replied that it had no insurance that would cover the matter. Suit was subsequently instituted. The lower court dismissed the action because the student had failed to give verified, timely notice pursuant to statute. That court felt that strict compliance with the notice requirement was necessary to recovery.

The appellate court noted that the lower court decision was rendered prior to a 1969 case wherein the state supreme court had declared that liberal construction of notice requirements would be judicial policy.

The school board conceded that the notice requirement could be satisfied by the filing and service of a complaint within the 60-day time period prescribed by the statute, but asserted that a complaint which is to serve as notice must be certified by the injured party. The court, however, was satisfied that if the injured person was a minor, his representative could verify the notice for him and that an attorney may act as that representative.

The court found that the complaint which was filed in the action, particularly when considered in conjunction with the attorney's letter, constituted substantial compliance with the statutory requirement of verified notice. The decision of the lower court was reversed, and the case was remanded to that court for trial.

Smith v. Clintondale School District
165 N.W. 2d 332
Court of Appeals of Michigan, Division 2, October 25, 1968; released for publication March 11, 1969.

An elementary-school child who was injured at school brought suit against the school district. The pupil contended that the injury occurred as a result of the removal of a lock from the commode door which permitted the door to swing inward and strike him, and that this was a dangerous or defective condition in the school building.

The school district moved for summary judgment on the ground that it is a state agency, clothed with sovereign immunity. The trial court granted the motion for summary judgment, and the pupil appealed.

The question on appeal was whether Act 170 (tort liability act) applies to a school district so that under section 6 the district may be liable for injury resulting from a dangerous or defective condition of a building under its control.

Act 170 restored immunity to certain levels of government after it had been abrogated judicially. Under this Act the state and its agencies are not immune from tort liability in three categories; one of these exceptions is with regard to defective maintenance of public buildings. The Act provides that governmental agencies (including school districts) are liable for bodily injury and property damage resulting from a dangerous or defective condition of a public building if the agency had active or constructive knowledge of the defect.

The court said that there was no question but that a school district could be sued for negligence under an exception to the Act. The instant case falls within an exception, and, therefore, summary judgment should not have been granted. The state has not lost its immunity, the court said, but it has, to the extent indicated, consented to be sued.

The lower court judgment was reversed.

Nebraska

Johnson v. Municipal University of Omaha
169 N.W. 2d 286
Supreme Court of Nebraska, June 20, 1969.

A student participant in a university track meet was injured when he fell upon a wooden box while pole vaulting. The box had been placed beneath the pole vault standards. The student alleged negligence on the part of the university in placing the boxes where they would unreasonably endanger persons and in failing to warn them of the presence of the boxes. The action was dismissed by the lower court on the ground of governmental immunity from tort liability. The only issues considered on appeal were whether or not the school was subject to suit and whether or not the school was immune from tort liability.

The court ruled that the school was a corporation and as such could sue and be sued. In considering the issue of immunity, the court said that the reasons supporting the common law doctrine of governmental immunity are no longer defensible.

The court held that "cities, counties, and all other governmental subdivisions, and local public entities of this state, including municipal universities, are not immune from tort liability arising out of a physical condition, affirmatively and voluntarily created by the public body on its premises, where the existence of the condition is not reasonably visible or apparent, and where the condition constitutes an unreasonable risk of harm to persons authorized to use and reasonably using the premises for the purposes intended."

The ruling was to apply to all causes of action arising within one month of the date of the

opinion. With respect to all other causes the new rule would apply only if the public entity carried liability insurance on the date that the claim arose.

The judgment of the lower court was reversed, and the case was remanded for further proceedings.

Root v. School District No. 25 of Custer County
169 N.W. 2d 464
Supreme Court of Nebraska,
July 11, 1969.

A high-school student was injured in a fall down a school staircase after being struck from behind by one or more students. He sued the school district, members of the school board, the superintendent, and the school principal, seeking to recover damages. The complaint alleged two acts of negligence: failure to provide adequate supervision in the halls, and failing to keep the stairway in proper condition.

The district contended that no liability existed against it under the doctrine of governmental immunity. The Supreme Court of Nebraska abrogated the doctrine of governmental immunity on June 20, 1969. (See case above.) However, the application of that rule was to be prospective only. The student in this case was injured on May 22, 1964, more than five years before the abrogation of governmental immunity. The court, therefore, held that the school board was not liable for its negligence or that of its employees on the date that the injury occurred. The decision of the lower court was upheld.

New Jersey

Hartmann v. Maplewood School Transportation Company
254 A. 2d 547
Superior Court of New Jersey, Law Division,
June 18, 1969.

The parents of a pupil injured for life in a school bus accident brought a negligence action to recover damages from the bus company, the bus driver, and the board of education of Maplewood and South Orange townships. That action was pending. The bus company insurers offered the parents $100,000, the limits of the policy, in settlement. The parents believed that the damages exceeded that sum and that neither the bus company nor the driver had assets sufficient to respond to a judgment in excess of the policy amount. The parents, therefore, in the instant action, sought a declaratory judgment to establish that the board of education was legally liable under the New Jersey save harmless statute for school employees to indemnify the driver for any sum recovered against him in the pending negligence action.

The court reviewed the appropriate New Jersey statutes dealing with school transportation and noted that the school board had chosen to contract out school transportation rather than provide it themselves. The bus company provided the liability insurance within the required limits. The driver was an employee of the bus company. The New Jersey save harmless statute has been construed to be for the sole benefit of school employees covered. No case has been found that extends the right of indemnification to any person who is not a school-board employee. The court held that under the statute a person "holding any office, position or employment under the jurisdiction of" a board means a person who is employed by the board in any such capacity and it does not mean a person employed by anyone else while doing work for the board.

The parents argued that the driver was an employee under the jurisdiction of the school board because the board had a degree of supervisory power over the persons employed by the bus company to drive school buses. The court said that the supervisory powers referred to were police powers exercised to protect school children. The court did not feel that it was proper to determine if the driver was an employee of the bus company, or the school board, or both in a declaratory judgment action, but that this matter should be presented and determined in the pending negligence action. The court was of the opinion that the only matter that could be determined here was that, in light of the history of the statute, a bus driver employed by one under contract with a board of education to transport school children is not entitled to be indemnified by the school board for liability incurred in that employment.

The parents' motion for declaratory judgment was denied.

New Mexico

Chavez v. Mountainair School Board
457 P. 2d 382
Court of Appeals of New Mexico,
July 3, 1969.

The parents of an injured pupil brought suit against the school board to recover for injuries sustained by their daughter when a "door closer" came loose from the wall of the gymnasium and struck her on the head. The trial court granted summary judgment in favor of the school board on the basis that its liability insurance did not cover this claim. The parents appealed. Liability insurance was in effect at the time of the accident.

In an independent proceeding, the school board had sought a declaration of its rights under the liability insurance policy, insofar as that policy was applicable to this claim. The

judgment declared that the insurance company was obligated neither to defend nor to indemnify the school board in connection with this claim. An appeal from the judgment was pending on the docket of the state supreme court. A New Mexico statute provides in part that "no judgment shall run against the...school district...unless there be liability insurance to cover the amount and cost of such judgment."

The summary judgment in the present case was granted on the basis of the declaratory judgment and the statute. On appeal, the court held that the summary judgment was correct and should be affirmed. The court stated, however, that if an affirmance was entered at this time, the claim in this case would be disposed of on the basis that there was no insurance coverage. Whether there was insurance coverage was a question still to be decided in the pending appeal of the declaratory judgment action. The court, therefore, delayed issuing a mandate until 30 days after such time as the state supreme court decided that appeal in order not to foreclose the claim in this case.

Ferreira v. Sanchez
449 P. 2d 784
Supreme Court of New Mexico, January 6, 1969; rehearing denied February 7, 1969.

A high-school student who had been injured brought suit against another student, the teacher in charge, and the principal. The girl had been injured as a result of an alleged negligent discharge of a pistol during the senior play. The play called for the use of a gun with a blank cartridge to be fired during the performance. The student who was to fire the weapon provided his own gun which was kept in a safe in the principal's office when not in use. Prior to the last performance another student substituted a live bullet and fired the gun causing the injuries complained of in this action.

The trial court entered a judgment against the offending student, but dismissed the action as to the teacher and the principal. The injured girl appealed from the judgment dismissing the action as to those two persons.

The injured student asserted that a pistol is a dangerous weapon and that its use on school premises created a condition that required a high degree of care by the school authorities. She argued that the trial court incorrectly applied the standard of ordinary care. The higher court reiterated previous New Mexico decisions which held that the person charged with the duty of care must use that degree of care which a reasonably prudent person would use under the same or similar circumstances. The court found that the harm to the student was not caused by the act of the teacher or the principal but rather the intervening act of a third person, another student. The injured student argued that the teacher and the principal should have foreseen that unauthorized persons might inflict harm with the pistol. The court disagreed and noted that the students in the cast were responsible and dependable and had conducted themselves in an exemplary manner at all times. No one without authority had previously touched the weapon nor was there any suspicion that anyone would bring a live bullet into the school. The court could not say as a matter of law that the intervening act of the student was foreseeable by the teachers.

The court upheld the conclusion of the lower court that the teacher and the principal were not negligent.

New York

Cherney v. Board of Education
297 N.Y.S. 2d 66
Supreme Court of New York, Appellate Division, Second Department, January 27, 1969.

An injured high-school student brought an action for damages against the White Plains school board. The jury awarded judgment to the girl, and the school district appealed. The girl was injured in physical education class while performing an exercise known as "jumping the buck." The girl testified that she had weak wrists and expressed apprehension about doing the exercise. The teacher directed that she try it and in doing so, her wrists collapsed causing the injuries complained of. The affidavit of the father made in support of an application for a late notice of claim omitted any reference to weak wrists. The accompanying affidavit of the student stated that she had read the statement of her father and that it was correct. Counsel for the school district attempted to offer both in evidence, but only the statement of the student was accepted.

The court was of the opinion that the student had established a case of actionable negligence. However, the affidavit of the father should have been admitted, and its exclusion deprived the school board of the benefit of the jury's appraisal of it vis-a-vis the testimony of the student. The father's statement was admissable as the daughter's statement, and omission of any reference to weak wrists in the father's affidavit constituted an omission by the student.

The judgment was reversed and a new trial ordered.

Ruggerio v. Board of Education of the City of Jamestown
298 N.Y.S. 2d 149
Supreme Court of New York, Appellate Division, Fourth Department, February 20, 1969.

A 17-year-old student who was injured in a fist fight with another student sued the board

of education for failure to provide proper supervision. The lower court found in favor of the student, and the school board appealed.

The testimony showed that both students were aware of the rules of conduct covering the locker room and knew that fighting was prohibited. Following the argument over the use of an unassigned locker, both made preparations to fight. Under these circumstances, the appellate court said, each should have foreseen the blows that followed, one of which caused the injuries complained of. Also, an instructor was in a nearby office and could have been called. The student instead elected a physical confrontion. In view of these facts, the court was of the opinion that the conduct of the injured student demonstrated a lack of regard for his own safety and was a direct cause of his injury. As such, his right to recovery was defeated.

The judgment of the lower court was reversed.

North Carolina

Crawford v. Wayne County Board of Education
168 S.E. 2d 33
Supreme Court of North Carolina, June 18, 1969.

An action was brought against the board of education on behalf of a first-grade pupil injured by a school bus. The bus ran over the leg of the child when he ran in front of it. At the time of the accident the bus was off the edge of the school driveway and traveling at 15 miles per hour. The action was brought under the State Tort Claims Act on account of the alleged negligence of the school bus driver.

The pupil's affidavit was substantially in the form prescribed by statute except that the name of the alleged negligent employee was missing. When the claim came on for hearing before the Deputy Commissioner of the Industrial Commission, the school board contended that the affidavit was defective because of the missing name. The affidavit was then amended to include the name of the driver. Counsel for the board stated at the time that he was not taken by surprise by the amendment, and was willing to stipulate that the driver was paid out of the nine months' school fund. Since some witnesses were not available at the original hearing, a second hearing was held. At the second hearing, held before a different hearing commissioner, the evidence of the board was presented. The Deputy Commissioner later filed his order awarding damages to the pupil. The full Industrial Commission affirmed his findings that the action of the bus driver constituted negligence on his part and that there was no contributory negligence on the part of the pupil. The board of education appealed.

The first point raised by the school board was that the missing name of the driver constituted a jurisdictional defect that could not be cured by amendment. The court disagreed. Since counsel for the school board stated that he was not taken by surprise and expressed his willingness to stipulate the name of the driver and that he was paid out of the nine months' school fund, the court ruled that it had jurisdiction.

The second contention of the board was that it was error for the Deputy Commissioner to write the decision when he was not present for all of the testimony and witnesses. The court said that due process and the concept of a fair hearing require only that an administrative officer who was absent when the evidence was taken consider the evidence himself. The court also felt that the failure of the school board to object when the second commissioner conducted the second hearing constituted a waiver. In addition, the board had sought and obtained a review before the full Commission. The Commission had the authority to reconsider the evidence or to take additional testimony; this it failed to do. The court said that it, therefore, can be assumed that the Commission felt that the board had not been prejudiced and that the findings of the Deputy Commissioner were not improper.

The final contention of the school board was that the pupil was guilty of contributory negligence. The court found as a matter of law that a six-year-old child is incapable of contributory negligence.

The court concluded that the facts found by the Commission were sufficient to support its award of damages to the pupil. The judgment was affirmed.

Pennsylvania

Esposito v. Emery
402 F. 2d 878
United States Court of Appeals, Third Circuit, October 2, 1968.

(See Pupil's Day in Court: Review of 1967, p. 49, Review of 1966, p. 39)

In January 1962, a second-grade pupil was seriously injured when a bank of school lockers toppled over on him as he was trying to open one of them. A year later the parents of the child, with whom he resided in Pennsylvania, had a resident of Delaware appointed as guardian of the boy's estate. It was conceded that this was done solely to create diversity of citizenship so that suit could be brought in federal court.

Shortly after the appointment of the guardian, suit for negligence was brought against the principal, the assistant principal, the director of administrative services, and the janitor. The school district was not named as a defendant because of the doctrine of immunity. The

individual defendants sought a summary judgment on the grounds that they, too, were immune for conduct within the scope of their authority as school employees. The district court rejected this contention. In the ensuing trial the director of administrative services and the assistant principal were dismissed as defendants. The court later granted judgment for the remaining defendants on the ground that there was no evidence of negligence on their part. The guardian appealed.

The appellate court had ruled upon another case decided the same day that henceforth cases of artificially manufactured diversity would be insufficient to create federal jurisdiction. However, this rule was not applied to the instant case, for to do so would leave no remedy to the pupil since a new suit in a state court was barred by the expiration of the Pennsylvania two-year statute of limitations. The court, therefore, considered the merits of the case. On examining the evidence, the court found it inadequate to establish any negligence by the individual defendants. The judgment of the district court was affirmed.

Vermont

Bridge v. Woodstock Union High School District
255 A. 2d 683
Supreme Court of Vermont,
June 20, 1969.

The father of an injured high-school student brought suit on his own behalf against the school district, seeking to recover for his loss of his daughter's services, her loss of wages, and medical and other expenses he incurred as a result of injuries she sustained. The trial court ruled that the evidence failed to establish negligence on the part of the school district. The father appealed.

The pupil was injured when struck by a skidding motorcycle as she stepped off the school bus. The motorcycle was out of control at the time of the accident and hit the girl as it passed on the wrong side of the bus. The father alleged negligence in that the bus driver failed to keep a proper lookout on the girl's behalf and that it was a breach of duty for the driver to indicate to the girl that she should "hurry." As to the first allegation, the court found there was no evidence of any warning to the driver at the time he stopped and let the girl off that the accident was imminent. The matter developed in a matter of seconds, and there was no opportunity to give any warning signal to the girl. Therefore, the lower court's conclusion that no conduct justifying the imputation of negligence on the part of the driver had adequate legal foundation.

Nor did the direction of the driver to the student to hurry support an allegation of negligence. The driver's proper concern for his passengers on his bus in an exposed position on a busy road justified his telling them to disembark promptly. Only if the comment induced or directed the girl to step into a position of danger, either known or reasonably to be anticipated in the circumstances, could an allegation of negligence be supported. The facts presented gave no such intimation of danger.

The judgment of the lower court was upheld.

Virginia

Crabbe v. County School Board of Northumberland County
164 S.E. 2d 639
Supreme Court of Appeals of Virginia,
December 6, 1968.

A student injured at school sued the school board and the teacher involved. The pupil injured his hand while receiving instruction in the operation of a power table saw. The student alleged that because of the negligence of the school board the saw was defective and improperly equipped, that this was known to the teacher, and that the teacher was negligent in permitting the student to use the defective tool and in failing to properly instruct him in its use.

The school board averred that in the operation of the school it was performing a governmental function and was, therefore, immune from liability. The teacher averred that this immunity extended to him. The lower court dismissed the suit, and the student appealed.

On appeal, the court held that in the absence of a statute waiving its governmental immunity, the school board was immune from liability for the injuries sustained by the student. The student had argued that statutes waiving immunity up to the extent of insurance for injuries involving school bus accidents should be applicable to the instant case. The court disagreed and said that the statutes were plainly limited to the operation of school buses. The lower court judgment in favor of the school board was upheld.

The court did not agree, however, that the immunity of the school board extended to the teacher, and ruled that the student had stated a good cause of action against the teacher. The judgment in favor of the teacher was reversed, and the case was remanded for a new trial.

RELIGION/SECTARIAN EDUCATION

Hawaii

Spears v. Honda
449 P. 2d 130
Supreme Court of Hawaii, December 12, 1968.

Public-school children brought suit to challenge Act 97 and rule 1 of the Hawaii state board of education, both of which permitted the use of public funds to provide bus transportation subsidies to sectarian and private-school pupils. The pupils asserted that the subsidies violated that provision of the state constitution that no public funds shall be "appropriated for the support or benefit of any sectarian or private educational institution."

Under Act 97 which took effect in July 1965, the state assumed the responsibility for transportation of school children and transported both public- and nonpublic-school pupils. Additional legislation in 1967, authorized the state department of education to provide suitable transportation for all school children in grades kindergarten through 12 and in special education classes and to promulgate rules and regulations relating thereto with a view to providing equal opportunity for education to the school children of the state. Following this enactment, the state board established regulations granting subsidized transportation to children in public and nonpublic schools whereby the children paid the first ten cents of the cost of the bus ride and were subsidized for the remaining cost. The responsibility for determining eligibility for the subsidy and for distributing the tickets was left to the nonpublic schools.

The crux of the plaintiffs' argument was that the state constitution was violated since the subsidy represented support or benefit to the nonpublic institutions. The state officials who were the defendants in the action argued that subsidy constitutes support or benefit to the children not the educational institutions. They also argued that there was a presumption in favor of the validity of the legislation. The lower court found no evidence to rebut this presumption and upheld the legislation under the child-benefit theory. On appeal, this decision was reversed.

In reaching its decision the state supreme court stated the general rule to be that if the words in the constitutional provision are clear and unambiguous, they are to be construed as written. If an act of the legislature is challenged as being repugnant to the constitutional provision, the burden of showing that it is unconstitutional is on the party asserting unconstitutionality, and that party must show that the repugnancy is too clear to admit of any dispute. The court found that the pupils had met this requirement. The court believed that the intent of the framers of the constitution regarding the nature of appropriations constituting "support or benefit" to sectarian and private schools was to specifically reject the child-benefit theory as applied to bus transportation and similar welfare programs for nonpublic-school pupils. The report of the committee on education at the time that the state constitution was adopted, the court said, placed major emphasis on public education and ruled out any aid to nonpublic schools except dental and public health services. The court found that the provision for these services did not constitute acceptance of the child-benefit theory.

The state officials argued that Everson v. Board of Education (67 S. Ct. 504, (1947)) was applicable. That decision upheld a New Jersey statute which provided transportation to nonpublic-school children. The Hawaii court did not agree that Everson was applicable to the Hawaii situation, for unlike the Hawaii constitution, the New Jersey state constitution did not proscribe such activity.

The Hawaii court held that the state constitution prohibited the state legislature from making any appropriation aiding a sectarian or private school, including subsidies for bus transportation. The court concluded that the contested statutes and rules and regulations of the state board violated the state constitution to the extent that they provided subsidies for nonpublic-school pupils. The portions of the statutes providing for the transportation of public-school pupils was valid.

Michigan

Alexander v. Bartlett
165 N.W. 2d 445
Court of Appeals of Michigan, Division 2, October 2, 1968; released for publication March 11, 1969.

Michigan taxpayers sought a declaratory judgment that the state statute providing for

transportation of pupils to nonpublic schools was unconstitutional as violative of the First Amendment because it appropriated money from the school aid fund for the benefit of parochial schools. The lower court upheld the law, and an appeal was then filed.

The statute in question provides that when a school district furnishes transportation for its resident pupils, it must provide transportation without charge to every resident child to the public or nearest nonpublic school meeting minimum state standards, provided the child lives at least 1-1/2 miles from the school of attendance.

The court reviewed pronouncements of the Supreme Court of the United States in this area and determined that the legislation met the tests of secular purpose and primary effect established by the Court for permissible legislation. It was the opinion of the Michigan court that the purpose of the transportation statute was to help children get to school safely and the primary effect could not be said to either advance or inhibit religion.

The taxpayers also charged that the statute violated the Michigan Constitution in that it forced them to contribute to a place of worship and provided money from the state treasury for the benefit of a religious sect. The portions of the state constitution relied upon by the taxpayers guarantee religious liberty to every person and command that the civil and political rights, privileges, and capacities of no person shall be diminished or enlarged on account of his religious belief. Reading the sections as a whole, the court concluded that they result in maintaining the neutrality of government toward religion, safeguard the free exercise of religion, and prohibit the establishment of religion. This, the court said, is similar to the Supreme Court interpretation of the Establishment Clause of the Constitution of the United States.

The final contention of the taxpayers was that the transportation legislation violates a provision of the state constitution of 1963 which provides that "there shall be established a state school aid fund which shall be used exclusively for aid to school districts, higher education and school employees' retirement systems, as provided by law."

The court noted that at the time the Michigan Constitution of 1963 was adopted, the framers knew that legislation providing for transportation of nonpublic-school children existed. Moneys in the school aid fund to reimburse school districts for the cost of transportation of school children have been paid to school districts as provided by law. The court found no constitutional violation under the cited provision.

The court concluded that the transportation law did not violate either the federal or the state constitutions. The lower court opinion was affirmed.

New Hampshire

Opinion of the Justices
258 A. 2d 343
Supreme Court of New Hampshire, October 31, 1969.

The senate of the state of New Hampshire submitted questions to the state supreme court regarding the constitutionality of proposed legislation. All inquires related to the question of whether the bills would violate the prohibitions against aid to church-supported schools contained in the state and federal constitutions.

It was the opinion of the court that since secular education serves a public purpose, it may be supported by tax funds if sufficient safeguards are provided to prevent more than incidental and indirect benefit to a religious denomination. Any aid provided would have to withstand the test laid down in School District of Abington Township v. Schempp (83 S. Ct. 1560). That test prohibits aid if either the purpose or the primary effect of the legislation is to advance or inhibit religion. In other words both the purpose and the effect of the legislation must be secular.

The first bill considered by the court would authorize cities and towns to grant a $50 exemption on real estate to persons having one or more children in a nonpublic school. The court felt that this legislation would produce unconstitutional discrimination, for it would make available to parents funds they could contribute to nonpublic schools without a restriction that it be spent for secular education. While the amount was small, if the principle were upheld, the court stated, the amount could be increased until it could be used as a means of fully supporting nonpublic schools.

The second bill considered would include pupils in nonpublic schools in the base for computing foundation aid to school districts. The court ruled that although this bill would reduce to some extent the real estate taxes paid by all persons, the primary purpose and effect would be to support those public purpose services to nonpublic school pupils which the district could constitutionally provide. The court concluded, therefore, that the bill could apply only to those districts which did provide such services.

The third bill considered would authorize school districts to furnish transportation to nonpublic-school pupils through grade 9 attending school outside the district even though such transportation outside the district was not furnished to public-school pupils. The court believed that this bill was of doubtful

constitutionality since it delegates undefined discretion to the school board which is easily subject to discriminatory application.

The fourth bill would authorize the district to furnish certain child-benefit services such as school doctor, nurse, child guidance, and educational testing services, and the like to nonpublic-school pupils. The court was of the opinion that the proposal, if enacted, would be constitutional under Supreme Court decisions which allow the furnishing of child-benefit services to pupils in nonpublic schools.

The fifth proposal submitted to the court would require school boards to purchase textbooks as are required for use in the public schools and to lend or sell them to nonpublic-school pupils. The court assumed that the books would be concerned only with secular subjects and as such the bill, if enacted, would be constitutional. A similar New York law had been previously upheld by the Supreme Court in Allen v. Board of Education (88 S. Ct. 1923, (1968)).

Another bill before the court which provided for dual enrollment of pupils at public and nonpublic schools had already been enacted by the state legislature. In view of this, the court ruled that it was their constitutional duty not to give an advisory opinion.

New York

McCartney v. Austin
298 N.Y.S. 2d 26
Supreme Court of New York, Appellate Division, Third Department, March 10, 1969.

(See page 79.)

Ohio

Honohan v. Holt
244 N.E. 2d 537
Court of Common Pleas of Ohio, Franklin County, November 26, 1968.

Ohio citizens and taxpayers attacked the constitutional validity of provisions of the state school bus law which provided transportation at public expense to pupils in religious schools. They asked that these provisions be declared unconstitutional as violative of the First Amendment of the Constitution of the United States and two provisions of the Ohio constitution. The school bus law mandated bus transportation at public expense to all elementary-school children who resided more than two miles from school and permitted such transportation for high-school students. The transportation was available to all children attending a "school for which the state board of education prescribes minimum standards," thus including nonpublic schools.

The taxpayers were aware that the Ohio bus law was not constitutionally distinguishable from the New Jersey law held constitutional by the Supreme Court in Everson v. Board of Education (67 S. Ct. 504, 1947). Instead they asserted that there was no recent opinion of the Supreme Court on the subject and that the reasoning in Everson would not be followed by the Court at this time. The Ohio court noted that subsequent to the filing of this suit the Supreme Court had rendered a decision in the New York textbook case upholding the principles of Everson. On the basis of this decision and Everson, the Ohio court ruled that the school bus law did not violate the federal Constitution.

The taxpayers also argued that in the interpretation of an Ohio constitutional provision, the court was not bound by any opinions of the Supreme Court in interpreting the federal Constitution. The state court said that in a literal sense this was true, but it did not find that the bus law violated any provisions of the Ohio constitution. The court concluded that the indirect benefits resulting to a nonpublic school from the bus transportation of pupils was not "support" of a place of worship within the purview of the Ohio constitution.

Summary judgment declaring the law to be constitutional was granted the defendant state officials.

TRANSPORTATION

Hawaii

Spears v. Honda
449 P. 2d 130
Supreme Court of Hawaii, December 12, 1968.

(See page 69.)

Kansas

Helburg v. Hoxie Unified School District No. 412
457 P. 2d 151
Supreme Court of Kansas, July 17, 1969.

The father of a kindergarten pupil living in the Hoxie school district sued to obtain reimbursement for transporting his child to school in the Hill City school district. The child's residence was about equally distant from the two schools, and was three miles from the nearest Hoxie bus route. She rode to school with her father who worked in Hill City. The lower court ruled in favor of the father, and the school district appealed. The only question on appeal was whether the Hoxie school district must pay for the child's transportation to Hill City schools.

The father had never sought to enroll the child in the Hoxie schools and the Hoxie school district first became aware of her existance when it received a bill for transportation charges from her father. The school district then offered to transport the child to the Hoxie schools as required by law. Both the school district and the father relied on different sections of Kansas law to support their case. State law provided that an agreement may be reached between school districts to accomodate nonresident pupils. Where there is an agreement, the law provides that the sending district pays the transportation costs. In this case no agreement was sought or reached between the two school districts, and consequently these statutory provisions were inapplicable.

The father relied on another section which provided that if transportation is not furnished to a child who resides more than two and one-half miles from school, the district shall pay mileage to the person who transports the child. The court ruled that the child would have to attend the Hoxie school before her father could recover under this section. While under the law the child could attend any school in the county outside her own district, there was no provision for furnishing transportation.

The court concluded that Kansas statutes did not permit the Hoxie school district to pay transportation charges for a pupil who attends school outside the district.

Kentucky

Hoefer v. Hardin County Board of Education
441 S.W. 2d 418
Court of Appeals of Kentucky, May 16, 1969.

The father of three school children brought an action charging the Hardin County board of education with violating the state transportation statute. The lower court entered judgment for the board, and the father appealed.

The children's home was one-half to seven-tenths of a mile from the school bus stop. The father maintained that the road that the children had to walk to reach the bus stop was dangerous and that the bus should pick them up at their home. The road was a narrow one-lane gravel road with little shoulder. The evidence indicated that the road was something of a "lovers' lane." The father complained that the children were required to walk by the evidence of the immoral use of the road. He also asserted that the road was used by speeding hot-rodders. The school board countered by stating that the road contained no more evidence of immoral activities than any other road in the county and that it was not heavily traveled. The evidence also indicated that the road contained two narrow wooden bridges without guard rails that would prohibit a bus from traversing its length and that the one turnaround opposite the children's home was of insufficient size to enable the school bus to turn around.

The law cited by the father directs the board of education to furnish transportation to elementary-school children who do not reside within a reasonable walking distance of school. The appellate court did not feel that the distance that the children had to walk to reach the bus stop was unreasonable or so dangerous as to require the school bus to pick them up at their home.

The judgment of the lower court was affirmed.

Michigan

Alexander v. Bartlett
165 N.W. 2d 445
Court of Appeals of Michigan, Division 2, October 2, 1968; released for publication, March 11, 1969.

(See page 69.)

New York

In re William
303 N.Y.S. 2d 270
Family Court, Richmond County, Juvenile Term, May 27, 1969.

The mother of two deaf children sought to have transportation provided for them from their home to a school for the deaf. The school that they had previously attended moved, and the distance between the school and their home was now 21.4 miles or 1.4 miles outside the 20-mile limit set by the commissioner of education. However, the school board did offer to provide schooling and transportation to another school. The parents offered to bring the boys to a spot within the 20-mile limit and to pick them up on their return. The board of education, however, maintained that it had no authority to transport any child beyond the 20-mile limit.

Under a section of the Education Law the commissioner could approve an order of the Family Court to provide transportation, but, the court stated, before it could make such an order, it must know the costs and consider what portion of the cost should be allocated to the parents.

The court held it did not have jurisdiction over the case, but that a proceeding could be brought to determine the reasonableness of the 20-mile limitation on transportation. The court suggested to the board of education that it join with the mother in an application to the state commissioner of education for a modification of his rulings on transportation as they apply to New York City.

The case was dismissed for lack of jurisdiction.

North Carolina

Sparrow v. Gill
304 F. Supp. 86
United States District Court, M. D. North Carolina, Winston-Salem Division, August 13, 1969.

The father of a grade-school pupil sought a declaratory judgment and injunctive relief declaring unconstitutional certain statutes concerned with school bus transportation. The sections in question provided that school bus transportation need not be provided to pupils residing in a city even though it is provided to pupils living outside the municipal boundaries and attending the city schools; also transportation previously provided would continue to be furnished to pupils who live in areas in which the corporate limits of a municipality had been extended since February 6, 1957. This was interpreted to mean that transportation could not be provided to the city pupils.

The gist of the father's complaint was that denial of transportation to his daughter who lived in a municipality while granting transportation to pupils who lived outside the municipal boundaries as they existed on February 6, 1957, was a denial of equal protection of the laws.

State funds are provided for some but not all pupils' bus transportation and are not allocated for transportation of disqualified pupils, namely, those for whom suit was brought.

The case involved three distinct classes of pupils, only one of which was denied bus transportation. The court said that "under the equal protection clause, the constitutional test to be applied is whether the classification is reasonable in the sense that it is based upon real distinctions between the classes vis-a-vis the subject of regulation." No one has a constitutional right to ride a school bus, the court continued, but a person cannot be excluded from a benefit that is conferred upon fellow citizens whose claim to it is no more reasonable than his.

According to the court, the issue was a state scheme for the allocation of a limited amount of state funds for school bus transportation. Accordingly the statutes must be evaluated by whether the legislature could reasonably conclude that the transportation was more imperative for some pupils than for others. Applying the test, the court held that the provision providing transportation to pupils living outside municipal boundaries was reasonable and constitutional. The legislature might reasonably conclude that county pupils in these areas would be less likely to have sidewalks and alternate transportation to school than the city pupils.

Applying the same test to that provision of the statutes which provided transportation for pupils residing in areas added to the municipality after February 6, 1957, the court held the provision to be unconstitutional. It found the fatal flaw to be the arbitrary date in that it was unrelated to the end sought to be achieved: the allocation of limited transportation funds for the benefit of those pupils who most needed it. The court could not conclude that urbanization was more pronounced in those older areas of the city than in areas added after February 6, 1957. The only possible purpose suggested for the arbitrary date distinction was to save or

limit the expenditure of state funds. Such a purpose, the court said, could be accomplished without resorting to irrational and arbitrary discrimination.

In their action the pupil and her father had urged that bus transportation be based on a measured distance from school. The court viewed this as a political question to be left to the people and the legislature. The court noted that while its decision invalidating the provision for transportation according to when an area became incorporated into the city limits altered the statutory scheme, there still was no "duty" to provide school bus transportation to any in-city school child.

Ohio

Honohan v. Holt
244 N.E. 2d 537
Court of Common Pleas of Ohio, Franklin County,
November 26, 1968.

(See page 71.)

Wisconsin

State ex rel. Knudsen v. Board of Education, Elmbrook Schools
168 N.W. 2d 295
Supreme Court of Wisconsin,
June 3, 1969.

The school district appealed from a lower court order which directed it to provide transportation for pupils attending private schools more than two miles from their homes and less than five miles from the boundaries of the district. A 1968 amendment to the transportation law provided that the district shall furnish transportation for each private-school child residing more than two miles from his school if the private school is located within the district or not more than five miles beyond and is the nearest available private school which the pupil may reasonably choose to attend.

There were four Catholic high schools within five miles of the district. One was an all-boys school, one an all-girls school, and the other two were coeducational. The student who was the plaintiff in the action attended the girls school for two years. In her junior year the school district formulated new regulations for transportation. The district drew service areas for each school and would provide transportation only to that school. The plaintiff lived in the area of Catholic Memorial School, one of the coeducational schools.

The lower court interpreted the statute to mean that any school within the geographical boundaries set out by the statute would be a private school which the child could reasonably choose to attend. Hence, the function of the board was ministerial not discretionary. The higher court did not agree with this interpretation, concluding that "the nearest available private school which the child may reasonably choose to attend" was a third requirement besides the two geographic ones necessary to compel the district to furnish transportation. The meaning of the statute is clear, the court said, that the school board has the discretion to determine whether the choice of the child is a reasonable one.

The court concluded that the trial court failed to take into account the discretionary power vested in the board by the statute. The court also concluded that the school board failed to exercise discretion when it arbitrarily determined that the student's choice of schools was unreasonable. Further, the reasons supporting her choice of school should have been considered by the board. Instead, the school district had taken the charter of Catholic Memorial High School, whose purpose was not related to transportation of students, and noted those parishes which were charged with the financial responsibility of the high school, and then concluded that it was reasonable for students residing in those parishes served by that school to attend that school and no other. The court considered the determination on this basis to be a complete abdication on the part of the board of its discretionary duty.

The final conclusion of the court was that the writ of mandate should properly have been issued on the ground that the board of education failed to exercise its lawful discretion and that the mandate should be that the board proceed to make its decision after a discretionary determination of whether the private school selected by the student was the nearest available school she might reasonably have chosen to attend. The judgment of the lower court was modified and affirmed.

MISCELLANEOUS

Alabama

Brooks v. Auburn University
412 F. 2d 1171
United States Court of Appeals, Fifth Circuit,
July 8, 1969.

Students and faculty members of Auburn University had obtained a district court decree (296 F. Supp. 188 (1969)) restraining the University president from barring the scheduled appearance of a speaker on the campus. The decree also required the payment to the speaker of the agreed honorarium and travel expenses. Auburn University appealed from this decision.

The record demonstrated that Auburn University had no rules or regulations governing the appearance of speakers on the campus. The standard procedure was for the Public Affairs Seminar Board to pass on requests from student groups to invite speakers. This procedure had been followed by the Human Rights Forum, the student organization that invited the speaker; but the University president who had the final authority ruled that the invitation could not be extended because the proposed speaker, Reverend William Sloan Coffin, Chaplain of Yale University, was a convicted felon and because the president believed that he might advocate breaking the law.

The district court was of the view that banning the speaker was in the nature of prior restraint and a violation of the First Amendment rights of the students. The circuit court of appeals affirmed the decision. The appellate court did not hold that no speaker could be barred. In this instance there was no claim that the appearance of the speaker would lead to violence or disorder or that the University would otherwise be disrupted.

Arizona

Quimby v. School District No. 21 of Pinal County
455 P. 2d 1019
Court of Appeals of Arizona,
June 20, 1969; rehearing denied July 30, 1969.

A high-school student who had been declared ineligible to participate in the school athletic program, sued to enjoin the school district and the Arizona Interscholastic Association from enforcing the regulations regarding his eligibility.

By judicial order, the student went to live with friends of his parents who became his guardians. As such, he attended a different high school from the one he previously attended. The student wished to participate in football, but was barred by a rule of the interscholastic association which prohibited participation until he had been enrolled in his school for two semesters. The Association did not recognize the guardianship papers in the student's case.

By the time the court's opinion was released, the case had become moot since the student's year of ineligibility had expired. The court, nonetheless, believed that the case was of sufficient interest to warrant a decision on the merits.

The student argued that by joining the Association and observing its rules, the school district had delegated its power and duty to make rules and regulations concerning the school district. The court did not believe that the school board had delegated any governmental power to the Association. The very nature of competitive sports requires that rules for the competition be set, the court said, but if a school district disapproves of the rules, it need not participate in the program and could withdraw.

The student also contended that the rule in question violated his individual rights. The court noted that the rules adopted by the Association had the direct effect of granting or denying participation in a part of the program of a tax-supported institution, and that if the Association, whose income came mainly from public funds, acted arbitrarily so as to discriminate against certain individuals or groups, there should be a remedy by judicial review. The court ruled, however, that the eligibility rule in question had a legitimate purpose, to prohibit coaches from overzealous recruiting and players from shopping between schools. Therefore, the judicial inquiry was at an end. Without passing on the legislative wisdom of the rule, the court held that it did not violate the constitutional rights of the student.

California

Dunbar v. Governing Board of Grossmont Junior College District
79 Cal. Rptr. 662
California Court of Appeal, Fourth District,
Division 1, July 22, 1969.

The Open Forum, a recognized student organization at Grossmont Junior College, sought to

arrange a debate on Viet Nam between a member of the Communist party and a member of the John Birch Society. The College had a policy of allowing controversial topics to be presented and procedural requirements for obtaining permission and securing facilities. In this instance the College would not allow the Communist to speak because of his membership in the Communist party. A student leader of the Open Forum, its faculty advisor, and others who were either members of the College faculty or residents of the junior college district sought a court order to compel the board to permit the Communist to speak. The lower court dismissed the action.

The appeals courts stated that while the governing board has a right to determine, control, and direct the educational program of the College, this right is subject to constitutional limitations. Once the board has opened a forum for the free expression of ideas, the court said, it may not exceed constitutional limitations in picking the ideas it wishes to be freely expressed. The extent to which the board may control speech on the campus, once it has created a forum for guest speakers as part of its educational program, depends on the circumstances involved in each instance. Discretion on the part of the board, however, may not amount to unbridled censorship. The court found no case where a speaker's membership in any organization, standing alone, was sufficient reason to forbid him to speak in an open forum. The court ruled that the petition sufficiently alleged facts from which it could be found that the board acted in excess of its discretion by restricting free speech beyond that allowable by the First Amendment when applied in the light of the special characteristics of the school environment.

The court held that only the student leader and faculty advisor of the Open Forum could petition the court for relief. As to them, the judgment of the lower court was reversed. But since membership in the organization was limited to students at the College, the other petitioners who were not members had no standing as aggrieved parties.

In re Donaldson
75 Cal. Rptr. 220
California Court of Appeal, Third District, February 6, 1969.

A high-school student appealed from a lower court decision which adjudged him to be a ward of the juvenile court because marijuana had been found in his school locker. The vice-principal of the school had searched the student's locker after being told by another student that she had purchased methedrine pills from the student. The search was conducted without a warrant and without the consent of the student.

The student contended that the evidence should not have been admissible since it was obtained by an unlawful search carried out by a school official. The student maintained that the official was a government official within the meaning of the Fourth Amendment. The state asserted that the vice-principal stood in loco parentis and had joint control over the locker and also that he was a private person to whom the Fourth Amendment did not apply.

The Fourth Amendment prohibits unreasonable searches and seizures by officials of the government. The prohibition also applies to a joint operation between a private person and the police. The court found that there was no joint operation in this instance and that the vice-principal was not a government official within the meaning of the Fourth Amendment so as to bring into play its prohibition against unreasonable searches and seizures. The court said that school officials have "an obligation to maintain discipline in the interest of a proper and orderly school operation, and the primary purpose of the school official's search was not to obtain convictions, but to secure evidence of student misconduct." The court, citing law and statutory provisions, concluded that school officials have responsibility to exercise careful supervision over the moral conditions in their respective schools, that the use of narcotics is not to be tolerated, and that students are required to comply with the regulations and to submit to the authority of the teachers.

The court stated that the school stands in loco parentis and shares, in matters of school discipline, the parent's right to use moderate force to obtain obedience, and that right extends to the search of a locker under the circumstances in this case.

The court held that the marijuana was not obtained by an unlawful search and seizure and affirmed the judgment of the lower court.

Illinois

McInnis v. Shapiro
293 F. Supp. 327
United States District Court, N.D. Illinois E.D., November 15, 1968. Affirmed, 89 S.Ct. 1197, March 24, 1969.

A number of elementary- and high-school students in four school districts in Cook County brought a class action against state officials, challenging the constitutionality of various state statutes dealing with the financing of the public school system. The students claimed that their Fourteenth Amendment rights to equal protection and due process were violated because the statutes permitted variations in per-pupil expenditures from district to district, and this resulted in a variation in the quality of educa-

tion, providing some students with a good education and depriving others, who have equal or greater educational need. The students who brought the suit claimed to be members of the disadvantaged group.

The students sought a declaration that the statutes were unconstitutional and a permanent injunction forbidding distribution of tax funds in reliance on these laws.

Illinois public schools are financed by local, state, and federal money, with about 75 percent of the funds being supplied by the local district. The financial ability of the school districts varies and thus per-pupil expenditures in the 1966-67 school year varied from $480 to $1,000. The state foundation program distributes a flat grant per pupil as well as an equalization grant. The latter grant is based on the assumption that each district levies only the minimum property tax. If the minimum property tax plus the flat grant from the state does not equal $400 per pupil, the difference is made up by the state. Thus, each district is guaranteed $400 per pupil. If the locality decides that it wishes more of an emphasis on education, it may tax itself more heavily. Such additional revenue is not considered in determining the equalization grant.

The students asserted that only a financing system that apportioned public funds according to the educational needs of the pupils satisfies the Fourteenth Amendment. They asserted that the distribution of school revenues to satisfy these needs should not be limited by such arbitrary factors as variations in local property values or differing tax rates. The court agreed that there were wide variations in the amount of money available to the school districts, but did not agree that the inequalities of the existing arrangement were unconstitutional.

The students further contended that the statutes were violative of the due process clause in that the wide variation authorized in the assessed valuation per student was irrational. They argued further that "the importance of education to the welfare of individuals and the nation" required the court to invalidate the legislation because it denied them equal protection.

While the court agreed that the "educational potential of each child should be cultivated to the utmost, and that the poorer school districts should have more funds with which to improve their schools," it also believed that "the allocation of public revenues is a basic policy decision more appropriately handled by a legislature than a court." The court found that the Illinois system of school financing produced inequalities, but that the system was not arbitrary nor did it amount to an invidious discrimination. The court concluded that there was no constitutional requirement that public-school expenditures be made only on the basis of a pupil's educational need or that they be equal for all pupils in the state.

In closing, the court stated that even if the Fourteenth Amendment were applicable, the controversy would be nonjusticiable since there are no "discoverable and manageable standards" by which a court could determine when the Constitution was satisfied and when it was violated. The complaint of the students was dismissed.

The Supreme Court of the United States affirmed the opinion.

Kansas

State v. Stein
456 P. 2d 1
Supreme Court of Kansas,
June 14, 1969.
Review denied, 90 S.Ct. 966, February 27, 1970.

A high-school student who was convicted of burglary and grand larceny appealed his conviction. The evidence against him was obtained in part by searching his school locker. At the request of police officers, the high-school principal, with the pupil's consent, opened the locker. In his motion to suppress this evidence, the student contended that he was not given warnings of his right to remain silent and his right to counsel as required by Miranda v. Arizona (384 U.S. 436) prior to the time that he consented to having his locker searched.

The court rejected that argument on two grounds. The first was that the court had previously ruled that the Miranda case was not applicable to search and seizure cases. The student had agreed to the search of his locker without any complaint. Secondly, the argument must fail because of the nature of a high-school locker. A student does not have exclusive possession of his locker. While his degree of control extends as to fellow students, his possession is not exclusive against the school and its officials. A school does not supply its students with lockers for illicit use in harboring pilfered property or harmful substances. The court held that it is a proper function of school authorities to inspect lockers under their control and to prevent their use for illegal purposes. This right of inspection, the court stated, is inherent in the authority vested in the school administrators and this right must be retained and exercised in the management of the schools if their educational functions are to be maintained and the welfare of student bodies preserved.

The court concluded that the evidence was admissible and that it was substantial and

supported the conviction. The appeal was thus dismissed. The Supreme Court of the United States declined to review the case.

Louisiana

Marino v. Waters
220 So. 2d 802
Court of Appeal of Louisiana, First Circuit, March 10, 1969; rehearing denied April 14, 1969.

The Louisiana High School Athletic Association appealed from an injunction which restrained it from enforcing a rule declaring plaintiff-student ineligible to participate in interscholastic athletics. The student had been attending a parochial high school when he married and moved. He was informed by that school where he was an outstanding football player, that married students were not permitted to attend. So that he would be eligible to participate in football at the public school that he would now attend, the student's parents moved into the apartment occupied by the student and his wife.

The rules of the Association provided that with certain exceptions no student who transfers high schools shall be eligible to participate in athletics at the new school. The exception which the student alleged applied to him provided that where the parents of a student made a bona fide move from one school district to another, the student could transfer all of his rights and privileges. The regulation defined a bona fide move and provided for the appointment of a committee to determine if the move was bona fide or made for the purpose of creating eligibility.

In this instance, the committee decided that the move of the parents was only for the purpose of helping their son attain eligibility to play football and, therefore, was not bona fide. The student then sought an injunction to prevent the Association from enforcing the rule. The lower court granted the injunction, and the Association appealed.

The student did not charge that he was treated any differently from other students. Instead, the issue was whether the rules as written and applied were constitutionally permissible. The court said that it was a basic and widely accepted rule that "courts will not interfere with the internal affairs of voluntary associations, except in such cases as fraud, lack of jurisdiction, or the invasion of property or pecuniary rights or interests." The Association in this case was a voluntary one formed by the high schools of the state to promulgate and enforce uniform rules governing interscholastic athletic competition. The court found that in this situation there was no fraud on the part of the Association, nor had it exceeded its jurisdiction.

The student argued that he was arbitrarily deprived of a property right in that his chances for an athletic scholarship to college decreased with the denial of eligibility for football in his senior year. It was the opinion of the court that participation in interscholastic athletics was a privilege, not a property right. Further, there was no showing that the rules of the Association were arbitrary or that they had been arbitrarily applied. The court cited many cases from other jurisdictions involving high-school athletic associations with regulations similar to the one here. The result reached was the same.

The court ruled that it had no power to disturb the Association's enforcement of its rules. Therefore, the decision of the trial court was reversed, and the injunction against the Association was dissolved.

Mollere v. Southeastern Louisiana College
304 F. Supp. 826
United States District Court, E.D. Louisiana, New Orleans Division, September 15, 1969.

Upper-class women at Southeastern Louisiana College brought suit, challenging the college requirement that unmarried women who are under 21 and do not live with their parents live in the college dormitories. The dormitories had been constructed with federal financing and a portion of the charges paid by each student was used to meet the debt obligation to the federal government. Students chose to live in the dormitories in decreasing numbers, and the state board of education resolved that the college require a sufficient number to live in them to meet the payments. The college then promulgated a rule that all unmarried female students under 21 and all freshmen male students not living with their parents live in the campus residences. The plaintiffs challenged the regulation only as it applied to the upper-class girls.

It was undisputed that the college's sole reason for the regulation was to meet the financial obligations which arose out of the construction of the dormitories. The two groups were chosen because they comprised the precise number needed to fill the dormitory vacancies.

The court noted that there may be legitimate reasons why a college might require students to live on campus, such as to promote their education or their welfare. The issue in this case, however, was whether the college could require a certain group of students to live on campus for the sole reason of increasing housing revenue. The court ruled that the college could not, holding that the regulation was the "type of irrational discrimination impermissible under the Fourteenth Amendment." Absent special educational considerations, the support of a housing system was an obligation that the court felt should fall on all students equally, not

just a select group. The court ruled that the regulation was a violation of equal protection.

New York

DePina v. Educational Testing Service
297 N.Y.S. 2d 472
Supreme Court of New York, Appellate Division, Second Department, January 13, 1969.

A high-school student sought to enjoin the Educational Testing Service (a) from rescinding the scores that he received on the College Board Entrance Examination Tests, (b) from notifying the college he applied to of any change in his scores, and (c) from altering his scores in any way. The trial court granted a preliminary injunction, and the Educational Testing Service appealed.

The student had taken the college board tests in March 1968. In April of the same year, an investigation was begun, and his paper was compared with that of another student who had taken the examination at the same time. This investigation revealed circumstances which indicated that the plaintiff-student had cheated. He was then requested to re-take the tests and was advised that if his new scores approximated his old ones, the original scores would be reported; if not, the new ones would be noted on his record. The student denied that anything improper had occurred and maintained that his scores were his own.

In view of the provision in the information bulletin regarding cheating, the appellate court was of the opinion that the granting of the preliminary injunction "was an improvident exercise of discretion." The appellate court held that the Educational Testing Service acted within its rights and obligations in requesting that the student re-take the tests.

The judgment of the lower court was reversed.

McCartney v. Austin
298 N.Y.S. 2d 26
Supreme Court of New York, Appellate Division, Third Department, March 10, 1969.

A school-age child and his parents sued to determine the constitutionality of the state statute providing that children receive certain immunization shots prior to being admitted to school. The lower court entered judgment for the Maine-Endwell school district, and the parents appealed.

At the outset, the appellate court said that it was well established that statutes of this nature are within the police power of the state and constitutional.

While the parents attacked the statute generally, they also contended that their child was within the statutory exemption given to children whose parents are bona fide members of a recognized religious organization whose teachings are contrary to the requirements of the statute. The parents were Roman Catholics. The court noted that one of the affidavits they had submitted negated that their religion had any proscription against inoculation. The court found it indisputably clear that the opposition of the parents was not based on religious grounds within the intent of the statute.

The parents also argued that if the exemption did not apply to them, the section granting the exemption was discriminatory and invalid under the establishment of religion clause of the First Amendment. The court said that even if their contentions in this respect were correct, they would not be benefitied in that the exemption clause would be found to be separable from the rest of the statute.

The judgment of the lower court was affirmed.

Oliver v. Donovan
303 N.Y.S. 2d 779
Supreme Court of New York, Appellate Division, Second Department, July 21, 1969.

The mother of four public-school children brought an action in mandamus against the New York City Superintendent of schools and the acting superintendent of District 15 to require them to institute disciplinary proceedings against the principal of the school attended by her children. In September 1968, the mother and other parents of children enrolled in District 15 schools had presented a statement of charges against the principal, but no action was taken by the authorities. The parents then brought this action. The lower court dismissed the action, and an appeal was taken.

The statement of charges contained 17 specifications of misconduct and incompetence, the New York City school strike, and others involving purely educational decisions made by the principal. The appellate court agreed with the lower court that the mother had no standing to sue with respect to these complaints.

However, the mother also made allegations that the principal had condoned physical abuse of the pupils and had failed to take action against an allegedly "alcoholic" school employee. The court noted that parents do not have a general power of supervision over school authorities, but where the parent alleges that her children are daily being exposed to conditions which threaten their health, safety, and welfare, a different situation arises. In such a situation the parents do have a right to bring an action for redress.

However, the court was unable to grant the requested relief because of the incorrectness of the papers filed. The petition was dismissed with leave to renew upon presentation of the proper papers.

People v. Overton
301 N.Y.S. 2d 479
Court of Appeals of New York,
April 23, 1969.

(See Pupil's Day in Court: Review of 1968, p. 60.)

A high-school student in whose school locker marijuana was found, sought to suppress its introduction as evidence at his hearing on the criminal charges. The New York Court of Appeals had ruled that the vice-principal, who had authorized the search of the locker, had the authority to do so despite the fact that the police had an invalid search warrant. The Supreme Court of the United States vacated the judgment and remanded the case to the New York court for reconsideration in light of its recent decision, Bumper v. North Carolina (88 S. Ct. 1788).

In Bumper, an elderly Negro woman was confronted by four white law enforcement officials who claimed the right to search her house pursuant to a warrant. She told them to go ahead. In refusing to find a consent to the search, the Supreme Court declared: "When a law enforcement officer claims authority to search a home under a warrant, he announces that the occupant has no right to resist the search. The situation is instinct with coercion--albeit colorably lawful coercion. Where there is coercion there cannot be consent."

The New York Court of Appeals did not feel that the Bumper decision required it to alter its original decision for these reasons: In Bumper there had been lawful coercion on the part of the police. In the instant case, the board of education had title to all school buildings and properties in the school district, including lockers. The administrator opened the locker as the representative of the owner, but just before that the student was questioned by the police in the administrator's presence and indicated there was marijuana in his locker. Therefore, the court felt that were it to apply Bumper, it would have to conclude that the vice-principal had been coerced into opening the locker. The court ruled that coercion was absent and had been displaced by the performance of a delegated duty, to enforce rules and regulations, one of which prohibits storage in lockers of materials which violate the law.

The court adhered to its original decision that the marijuana was admissible as evidence.

Shanks v. Donovan
303 N.Y.S. 2d 783
Supreme Court of New York, Appellate Division, Second Department, July 21, 1969.

Parents of New York City school children sought to require the superintendent of schools and the acting superintendent of District 15 schools to take disciplinary action against the principal, assistant principal, and a custodian employed in the District 15 schools. The first two employees had participated in the New York City school strike in September 1968, despite a direct order that they report to work each day of the strike. The custodian had allegedly engaged in disruptive conduct during the strike. It was further alleged that dispite requests from the parents, disciplinary proceedings were not brought against these employees because of the "no reprisal" condition of the settlement of the teachers' strike. The requested relief was denied by the lower court on grounds that the parents had no standing to sue.

The appellate court upheld this decision, saying that a parent had no general power of supervision over school authorities but must demonstrate some continuing or threatened injury to the interests of his child in particular. The only injury alleged by the parents was the "difficulty of impressing moral norms" on children who have witnessed lawless conduct go unpunished. This, in the view of the court, was entirely insufficient to demonstrate the particular injury necessary to confer standing on the parent to bring a court action.

Zucker v. Panitz
299 F. Supp. 102
United States District Court, S.D. New York,
May 15, 1969.

A group of students at New Rochelle High School sought a declaratory judgment and injunctive relief to prohibit violation of their right to free speech by school officials. The students sought to publish an advertisement in opposition to the Viet Nam War in the student newspaper at the usual rates. The editorial board of the paper accepted the advertisement, but the school principal directed that it not be published.

The students alleged that the purpose of the paper among others was "to provide a forum for the dissemination of ideas and information by and to the students of New Rochelle High School." They claimed that prohibition of the advertisement unconstitutionally abridged their freedom of speech. The school officials, however, characterized the student newspaper as a "beneficial educational device" developed as part of the school curriculum and intended primarily to benefit those who compile, edit, and publish it. They asserted a long-standing policy of the school administration limiting

news items and editorials to matters pertaining to the high school and its activities and that this policy similarly applies to the advertisements. In sum, the school officials argued that the war is not a school-related activity and, therefore, is not qualified for news, editorial, or advertising treatment.

In reviewing past copies of the paper, the court found articles concerning the draft and student opinion of the war. This being the case, the court found no logical reason for permitting news stories on the subject but precluding student advertising.

The school officials also contended that their action was correct because students have no right of access to the school newspaper. They argued that the recent Supreme Court decision in Tinker v. Des Moines Independent Community School District (89 S. Ct. 731) did not apply in that students as private citizens would have no right of access to the private press. The court, however, responded with quoted portions of the Tinker decision which held that the principle of free speech is not confined to the classroom discussion alone. The officials also maintained that the school newspaper is not a newspaper in the usual sense but a part of the curriculum and an educational device. The court said this position was inconsistent with their prior one. Having found that within the context of the school and educational environment, the school newspaper was a forum for the dissemination of ideas, and if the newspaper was open to free expression of ideas in the news and editorial columns, the court held that it was patently unfair in the light of the free speech doctrine to close to the students the forum that they deemed effective to present their ideas.

The motion of the students for a summary judgment was granted.

Tennessee

Smith v. University of Tennessee
300 F. Supp. 777
United States District Court, E.D. Tennessee, N.D., April 18, 1969.

Students and faculty members of the University of Tennessee sought to enjoin University officials from enforcing rules which prohibit students from inviting as speakers for University-sponsored programs, persons who do not meet certain standards. The University's guidelines for student invitations to speakers were that the invitation to a speaker sponsored by a student organization must be approved by the appropriate officers and advisors to the organization and approved by the dean of students as meeting the following criteria: (a) The speaker's competence and topic shall be relevant to the approved constitutional purpose of the organization. (b) There is no reason to believe that the speaker intends to present a personal defense against alleged misconduct or crime which is being adjudicated in the courts. (c) There is no reason to believe that he might speak in a libelous, scurrilous, or defamatory manner or in violation of public laws which prohibit incitement to riot and conspiracy to overthrow the government by force. In addition to these criteria, the University Faculty Committee must consider the general question of whether the invitation and its timing are in the best interest of the University.

The controversy arose when a student organization with an officially sanctioned lecture series at the University sought to invite two speakers of whom the University disapproved and refused to allow to speak on campus.

The court saw the case as one where the First Amendment rights of the students and faculty to hear the speakers must be balanced against the rights of the University officials to control and regulate public speaking on University property. In this regard, the court said that it has recognized that in carrying out their primary mission of education, state owned and operated schools may not disregard the constitutional rights of the students and universities have the right to enforce rules governing the appearance of guest speakers. No one has an absolute, unlimited right to speak on a college campus; however, when the University opens its doors to visiting speakers, it must follow constitutional principles if it seeks to regulate those whom recognized student groups may invite. Thus, the question before the court was whether in this case the University's existing regulations on student-invited speakers was too vague or overbroad to meet constitutional requirements.

The court held that the first University guideline requiring the speaker's competence and topic be relevant to the approved purpose of the student organization was overly broad and vague. The guideline did not state who was to judge the competence and topic or what standards were to be used in so judging. The guideline was so vague that an administrator could, if he chose to do so, act as an unrestrained censor of the expression of ideas with which he does not agree. The court found the same problems to exist with respect to guidelines 2 and 3 set out above, namely, who was to judge and by what standards. Therefore, these guidelines were also held by the court to be too vague and broad.

Of the last rule which required the University Faculty Committee to consider whether the invitation and its timing are in the best interests of the University the court said: "Any speaker could be debarred from the campus if it

were determined that he was invited at the wrong time under this guideline. This vests in the administrative officials discretion to grant or withhold a permit upon criteria unrelated to proper regulation of school facilities and is impermissible."

The court concluded that the existing regulations do not satisfy the requirement of the Constitution that restrictions on First Amendment freedoms be clearly and narrowly worded. Judgment for the students was rendered.

Texas

Passel v. Fort Worth Independent School District
440 S.W. 2d 61
Supreme Court of Texas,
April 16, 1969; rehearing denied May 14, 1969.

(See Pupil's Day in Court: Review of 1968, p. 61.)

High-school students sued to have a portion of the Texas Penal Code declared unconstitutional and to enjoin the school district from denying any student admission to school because of membership in a "charity club." The challenged statute prohibits public-school fraternities, sororities, or secret societies, and provides for the suspension or expulsion of any student who joins a prohibited organization. The school district pleaded two defenses: (a) The students had not exhausted their administrative remedies. (b) The action was an improper attempt to have an equity court pass on the validity of a criminal statute without showing irreparable injury to vested property rights. Both the trial court and the intermediate appellate court sustained the arguments of the school district. The students appealed.

The school district adopted a supplementary enrollment form effective in 1967 which required the parents of all students to state that their son or daughter was not or would not become a member of any of the prohibited organizations. The extent to which the charity clubs affected the operation of the schools was not fully disclosed by the record, but there was indication of disruption in some schools.

In response to the argument of the school district that a court of equity could not determine the validity of a criminal statute, the court pointed out that the students were not attempting to enjoin prosecutions under the law, but were seeking to prevent administrative enforcement of the regulation adopted for the purpose of implementing the statute. The students contended that the statute and the board regulation did not apply to charity clubs, and if they did, this was an unconstitutional interference with the right of free association. The court noted that criminal courts could not rule on the validity of the statute unless a prosecution were instituted, and that the students had no way to attack the regulation except by administrative appeal or a civil action. Under these circumstances, the courts have power to grant relief. Therefore, the court held that the trial court erred in dismissing the action on the ground that it lacked jurisdiction to construe and determine the constitutionality of the criminal statute.

The school district also contended that the students had not exhausted their administrative remedies prior to instituting the court action. It argued further that apart from the statute, its rule that the students file a membership disclaimer was a valid exercise of its powers. However, it was clear to the court that the rule was adopted to insure compliance with the statute. The students did not contend the rule was an abuse of discretion, but were basing their attack on the constitutionality of the statute and the rule, and both must stand or fall together. The court was of the opinion that the case involved questions of law that could be decided by a court after the facts concerning the effect of the clubs on the operation of the schools has been fully disclosed. Therefore, it was not necessary for the students to prosecute an administrative appeal prior to bringing the court action.

The court did not render a decision on the merits of the case. Rather, it ruled that the case should not have been dismissed by the lower court, and the case was remanded for further proceedings.

Virginia

Burruss v. Wilkerson
301 F. Supp. 1237
United States District Court, W.D. Virginia, Harrisonburg Division, November 16, 1968.

School-age children and residents of Bath County, Virginia, sought a declaratory judgment to the effect that the Virginia statute under which state funds are apportioned to local school districts is unconstitutional under the equal protection clause of the Fourteenth Amendment. The gist of their argument was that the apportionment formula works to the disadvantage of the relatively poor rural counties and thereby denies the school children of those counties an educational opportunity comparable to that enjoyed by children in most other Virginia school districts.

The state officials who were the defendants in the action moved to dismiss for the reasons that the complaint failed to state a cause of action, that the court lacked jurisdiction of the subject matter and the parties, and that

the requested relief could be granted only by a three-judge federal court.

The federal district court was of the opinion that it did have jurisdiction over the parties to the suit and the subject matter of the suit. The court also held that the failure of the pupils to request a three-judge court would not justify dismissing the complaint, for the court had the responsibility of determining the need for convening a three-judge court. Thus, if the complaint presented a substantial constitutional question, it could not be dismissed but would have to be heard by a three-judge court.

In determining whether or not a substantial constitutional issue had been presented, the district court noted that no Supreme Court decisions foreclosed the question presented; rather, Brown v. Board of Education clearly recognized the right to an equal educational opportunity. The district court found it clear that discrimination based on poverty was no more permissible than discrimination based on race.

The district court was unable to say with certainty that constitutional issues presented were wholly without merit. The motion of the state officials to dismiss the complaint was overruled, and the district court requested that a three-judge federal court be convened to hear the case.

Note: In subsequent court action, the three-judge court decided on May 23, 1969, that the state statute in question did not violate the Fourteenth Amendment. An appeal was filed in the Supreme Court of the United States, which on February 24, 1970, affirmed the decision of the lower court. (90 S.Ct. 812)

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